JOHN HOPE

Advocate

NATIONAL LIBRARY OF SCOTLAND EDINBURGH

A

# TREATISE

ON THE

# LAW OF BILLS OF EXCHANGE, &c.

IN

# SCOTLAND.

OLIVER & BOYD, PRINTERS.

A

# TREATISE

ON THE

John Hope

# LAW OF BILLS OF EXCHANGE,

## Promissory Notes,

AND

# LETTERS OF CREDIT,

IN

# SCOTLAND.

---

By WILLIAM GLEN.

---

*SECOND EDITION,*

CORRECTED AND GREATLY ENLARGED,

INCLUDING

THE MOST IMPORTANT DECISIONS IN SCOTLAND AND ENGLAND,
BROUGHT DOWN TO THE PRESENT PERIOD.

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BY A MEMBER OF THE COLLEGE OF JUSTICE.

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# ADVERTISEMENT

## TO THIS EDITION.

THE Proprietors of the late Mr Glen's Treatise on Bills of Exchange, Promissory-notes, &c. now offer to the public a Second Edition of that work, much enlarged, and adapted to the practice of the present day.

The want of a modern treatise upon the law and practice of Bills of Exchange and Promissory-notes has long been a subject of complaint and of serious inconvenience, both to the legal and mercantile classes of Scotland. These deeds are met with so frequently in the daily business of life; and the circumstances to be attended to respecting their form, transmission, and legal effect, with the duties of the parties engaged, are so numerous and minute, while the consequences of ignorance or negligence regarding any of these particulars are often so serious; that such a work is more necessary in this, than perhaps in any other department of the law.

Mr Glen's Treatise, which contains a correct and practical view of the modern law upon the subject, was acknowledged, at the time it was published, to have gone far in removing this evil. A considerable accession of new authorities has, however, been furnished by the decisions of the Court of Session since that period. In one respect, also, the work was susceptible of improvement, by the adoption of authorities and illustrations from the enlightened and more matured system of the English law, in addition to the decisions of the Court of Session, to which the author chiefly confined himself. That the *commercial law* of both Scotland and England is the same in its leading features, we are assured, not only by the most approved modern writer on the law of Scotland, but by the procedure of the Court of Session itself, in allowing the adjudged cases of the English courts on the different branches of that law, to be quoted as authorities before it. Hence, a proper selection of the decisions which have been pronounced regarding Bills of Exchange in England, where many points have been illustrated with a degree of minuteness quite unknown in Scotland, is indispensable, in order to exhibit a view of the law and practice on that subject at the present day.

To increase still farther the usefulness of the work, and to make it include those points which have been determined since its first publication, this edition has been carefully revised, and such corrections and additions introduced into the notes, as were suggested to the Editor both by the authorities formerly referred to by Mr Glen, and by the later decisions of the Court of Session. The Editor has also endeavoured to supply the defect of the first edition, by noticing and explaining, from the judgments of the English courts, those particulars as to which Scots authorities were deficient, or altogether silent; taking care, at the same time, to exclude such cases as were founded on the forms of pleading or peculiarities of the English law, and to make use of such only as were properly illustrative of the usages and customs of merchants; and to mark the instances in which the courts of the two kingdoms have differed, and established opposite rules. A few of the notes which were appended to the first edition are now distinguished by the letter A. The text has been reprinted without alteration, with the exception of the second division of Chapter XII. That division, which, in the first edition, contained only a few remarks on the two Scots decisions bear-

ing on the subject of the ranking of cross-acceptances, appeared to the Editor to admit of the consideration of several important practical points regarding the rights of parties on the bankruptcy of the obligants on a bill, which could not have been conveniently stated in the notes. He therefore remodelled that part of the work, and enlarged it as far as was consistent with the size of the volume, taking advantage of the materials which had been used by Mr Glen. And, on the whole, he has endeavoured, in the present edition of this treatise, to exhibit a correct and practical view of the law of Bills of Exchange and Promissory-notes, as it now exists in this country.

The Publishers are sorry that so long a period has elapsed since they first announced the publication of this work. The delay, however, has been occasioned by circumstances which were beyond their control, although their utmost endeavours have been used to obviate it.

# PREFACE

## TO THE FIRST EDITION.

THE following work was undertaken, from a consideration that it might be useful to the commercial part of the community, to have the law and authorities relative to bills of exchange collected and stated in a form to which all might have access. For above a century past, the trade and manufactures of this country have been advancing with rapid strides; and bills have come to be so generally employed in all mercantile dealings, that they may be said to have in a great degree superseded the use of cash. It is highly necessary, therefore, that every person should in some measure be acquainted with the laws established with regard to these documents.

From the number of questions that have occurred, and which have been ultimately determined by the Supreme Court of the kingdom, a great mass of decisions has been reported; and as the law might be considered as ascertained in

so many cases, the subject, as a branch of the commercial jurisprudence of the country, being obviously susceptible of the form, seemed to be entitled to the rank, of a separate treatise. As this might be accomplished by a proper selection and arrangement of the materials, the Author conceived that he could not better employ his leisure hours, than in endeavouring to collect the authorities from the different volumes of decisions, and to reduce them, along with the information derived from other sources, into something of a systematic shape.

It is perhaps somewhat singular, that although, in England, there is a great variety of treatises on bills, no recent attempt of the kind has been made in this country, where bills are peculiarly interwoven with many parts of the municipal law, so as to hold a very interesting and conspicuous station. The only work on the subject is that of Mr Forbes, Professor of Law in the University of Glasgow, which was written and published about a hundred years ago,—a performance unquestionably of merit in its day, and displaying considerable erudition, but which is now rather obsolete, both in matter and style.

In treating the subject under different distinct heads, in the natural order of the constitution,

transference, and extinction, of the bill, it was scarcely possible to avoid some repetitions; but the charge of redundancy was rather chosen to be incurred, than that of being unexplicit or obscure. Many disputes having arisen from an ignorance of, or inattention to, the necessary requisites of bills, the Author has been particularly full on that part of the subject. To professional men, the details into which he has entered may appear unimportant or unnecessary; but it is to be remembered, that the work is in a great measure calculated for classes of the community who have not the same opportunities of acquiring information that they have; and, by the candid, this will be admitted as a sufficient excuse. But even to professional men it may be of service, inasmuch as it may tend to point out cases, and direct their attention to authorities, which they may wish to consult.

It is therefore hoped that the work will be found to be of some utility; but, whatever may be its reception, the author will at least have the satisfaction of reflecting, that his researches have been accompanied often with amusement, and generally with some improvement to himself.

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# INTRODUCTION.

Bills of Exchange are universally acknowledged to be most useful instruments of commerce; nor is it easy, in the present day, to conceive how an extensive trade could be carried on without them. In a commercial country, it is an object of rational curiosity, to trace the history of any of those causes, to the operation of which trade in general may have been indebted for its prosperity and advancement. But the origin of bills of exchange is involved in considerable obscurity, and it is not very well ascertained whether the invention is attributable to the ancient or modern world.

Origin of money.

In the rudest stages of society, it is natural to suppose that the limited traffic of mankind was carried on by barter, or a direct exchange of commodities. But the inconvenience and inadequacy of this must soon have taught them the necessity of adopting some common standard of value. It is probable, that those commodities hich were of most current disposal, or in greatest request, were at first used as a measure of the exchangeable value of others. In early

times cattle seem to have been a common instrument of commerce; and in Homer, the price of armour is estimated by the number of oxen which it cost. In preference, however, to every other commodity, men appear in all countries to have soon given a decided preference to metals as a medium of exchange. Iron performed the function of money at Lacedemon, and copper among the first Romans; but, in richer countries, the precious metals superseded all others. We find that gold and silver were used, at a very remote period, as a representative of value, not merely in bullion, but as current money. Abraham weighed to Ephron four hundred shekels of silver, current money with the merchant, for the field of Machpelah.[a] The shekels are here said to have been received by weight; but it is pretty evident they were a coined money: for, among the same people, it is afterwards represented that, to facilitate the offerings to the tabernacle, they were furnished with half-shekels and smaller coins, to purchase sheep, doves, &c. for the sacrifices.[b] And at any rate, the transition is obvious from the use of the precious metals in bullion as a medium of exchange, to the erection of mints, and the institution of coins, by which the weight and fineness of the metal is ascertained.[c]

Origin of bills of exchange.

But, as the carriage and transportation of specie from one country to another must have

[a] Gen. ch. 23. v. 16. [b] Exodus, ch. 30. and 38.
[c] Wealth of Nations, v. i. p. 38.

been liable to many accidents, and attended with considerable danger, the adoption of bills of exchange would apparently be a necessary consequence of extensive commercial dealings;[d] as, by their aid, the value of money may be transmitted without risk, from the most distant quarters of the globe. It might be thought, therefore, that, like many other excellent mercantile expedients, which necessity and experience seem gradually to have suggested, the use of bills must soon have occurred to any people in the habits of frequent and established intercourse with other countries, the communication between which and their own was in any degree exposed to difficulty or peril.

Inquiry whether they were known to the ancients.

Almost all the French[e] and English writers on the subject, however, agree in this, that bills of exchange are of modern origin. Few traces of bills are indeed to be met with in antiquity;

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[d] Molloy de Jure Maritimo et Navali, v. ii. b. 2. c. 10.

[e] Savary concludes his Inquiry 'de l'Origine du Contract de Change de place en place par Lettres,' in this categorical manner, 'Ce chapitre ne fournit qu'une maxime.'

MAXIME.

'Le contrat de change n'a pas eté connu par les anciens.' L'Art des Lettres de Change, ch. 2.

Montesquieu expressly ascribes the invention to the Jews in the middle ages. 'Ils (les Juifs) *inventerent* les lettres de change; et par ce moyen le commerce put eluder la violence, et se maintenir partout: le negociant le plus riche n'ayant que des biens invisibles qui pouvoient etre envoyés partout, et ne laissoient de trace nulle part.' De L'Esprit des Loix, Liv. 21. ch. 20.

Pothier observes, 'Qu'il n'y a aucun vestige de notre contrat de change, ni des lettres de change dans le Droit Romain.'—Traités de Droit Civil, tit. du Contrat de Change, n. 6.—Dupuis de la Sérra, &c.—A.

but Boucher, in his Commercial Institutions,[f] is of opinion, that the ancients must have been acquainted with the exchange-contract, whether the proper bill of exchange, as the instrument by which it is accomplished, was known to them or not. "In the history of the commerce and navigation of the Egyptians," says he, "we find, that when the young Hyrcanius travelled to Alexandria, to congratulate, in behalf of the Syrian nobility, king Ptolemy Epiphanes, on the birth of a son, his father Joseph gave him a letter on his correspondent, a Jewish merchant there, who advanced him considerable sums, as well for his own expenditure, as for the presents made by him to the king and queen of Egypt. It is presumed,' he adds, 'that on this transaction the Jewish merchant would have a premium of exchange, and a commission corresponding to the expense and risk of transmitting the money into such a country as Egypt, which was then infested with robbers."[g]

Cicero, too, informs Atticus,[h] that "being desirous of sending his son to Athens, he meant to spare him the trouble and necessity of carrying the cash for which he might have occasion, by arranging with some one at Rome who would charge himself with ordering payment of the money, by one or other of his debtors at Athens." Pothier remarks, that this was more

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[f] Institutions Commerciales. Paris, 1801. [g] Chap. 21. p. 193.
[h] Epist. ad Att. xii. 24—xv. 25.

of a simple mandate, than of a bill of exchange; but the learned professor has himself defined a bill of exchange to be a mandate; and the mandate by which Cicero transmitted the value of money from Rome to Athens must have been something analogous to the exchange-contract, as the difference in the value of money in the two places, if not the rate of exchange, must have entered into the transaction. There is, no doubt, this essential difference, that the contract of mandate is gratuitous in its nature, and the mandate cannot be transferred by the mandatory; whereas the mandate by which the contract of exchange is executed is both transferable in the way of negotiation, and is not always gratuitous.[i]

But it has been shewn in a pretty satisfactory manner, by an ingenious writer, in his philosophical dissertations on the Greeks, that even the proper bill of exchange, as a mode of transferring property, and making remittances in payment of commodities, was known to the Athenians in their mercantile operations. In treating of the commerce and finances of Athens, and describing the trade carried on by that city with the ports of the Taurica Chersonesus, which we now name the Crimea, the following passage

[i] Yet, it does not appear that the commerce of the Romans was carried on by means of bills of exchange, since, by one of their laws (*De nantico fœnere*), a person lending money to a merchant who navigated the seas, was under the necessity of sending one of his slaves to receive the sum lent, when the debtor arrived at his destined port.

occurs, which, as it is curious, deserves to be transcribed:

"In short, Theudosia (one of the ports) was, in the time of Demosthenes, the grand intrepôt of the commerce of the Athenians in the Crimea; and they exported from it, in the course of a few years, an almost incredible quantity of grain. As the Black Sea is extremely stormy, and the straits of the Propontis strewed with rocks and shoals, many cargoes were lost in so long and perilous a voyage. Besides, in time of war, it was necessary to have armed squadrons to convoy the vessels which transported the harvests of the Peninsula to Attica; and this was attended with a double expense, that exhausted the riches of individuals and the public treasure.

"It is in the operations of this commerce, that we find the first notion of bills of exchange; and Isocrates says in the clearest manner, that a stranger who had brought cargoes of grain to Athens, gave to a merchant there named Stratocles, a bill of exchange drawn upon some place in the Euxine Sea where there was money owing him. He to whom the bill was delivered found it of the greatest benefit; for he had no occasion to expose his fortune upon a sea swarming with pirates and Lacedemonian privateers, which lay in wait to capture every vessel that came out of the ports of Attica.

"It may therefore be said, that it was at first the dangers of the sea, and afterwards the dread of corsairs, or declared enemies, which inspired

merchants with the idea of such an operation. As the credit of the Greeks, however, was in little repute, this Stratocles, of whom we were speaking, took very good precautions: for he required, as security, a banker of Athens, upon whom he might have recourse, in case his bill was protested in the Crimea, inasmuch as he who had drawn it was at that time without any fixed residence."[k]

But it must be acknowledged, that if the ancients were at all acquainted with bills of exchange, it must have been in a very limited degree; for scarce a vestige of them remains in history; and if these instruments were known, it is somewhat unaccountable that they were not introduced into more general use than they seem to have been. No authentic record is extant of their having been employed by the Rhodians, Phenicians, Carthaginians, and other commercial states. Nor is any notice taken of them

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[k] De Pauw, Recherches Philosophiques sur les Grecs, tom. 1. p. 2. § 5., and Demosthenes, Isocrates, and Strabo, there quoted. Even at present, the trade carried on with the Russian ports in the Black Sea, labours under a considerable disadvantage, from the want of a fixed exchange. Most of the ships going to Odessa and Taganrock, are obliged to carry specie, viz. Venetian sequins, Dutch ducats, or Spanish dollars, which are purchased, at no small expense, at Constantinople or Smyrna. This money, even after the risk of sea-carriage, must, on arriving at the above ports, be packed up and forwarded to Moscow, to be exchanged for Russian paper-money, the only money, except copper coin, which is current among the holders of produce. The loss and inconvenience attending this mode of trafficking, independent of the risk of transmitting specie by a dangerous and ill-known sea, is sufficiently evident. At times there has been a loss of 30 per cent., and never less than from 15 to 20 per cent.; which might be avoided, by an established correspondence and credit, and the power of drawing bills of exchange.—A.

in the famous Rhodian laws with regard to navigation and maritime affairs, which were adopted by the Romans; and as they are not mentioned in the civil law, Pothier very justly infers that they were unknown to that people.

Origin of bills in modern times.

In modern times, bills of exchange appear to have been first used, to any extent, about the end of the twelfth, and beginning of the thirteenth century, by the Jews, who, being obliged to make a precipitate retreat from France and England, on account of the exorbitant exactions of the sovereigns of these kingdoms, took refuge in Italy, where they contrived to withdraw their property from the countries from which they had fled. This they accomplished, by giving letters to foreign merchants and travellers, addressed to the persons under whose charge they had left their effects, who, by complying with the orders contained in these letters, discharged the trust reposed in them.[1] A similar method is said to have been employed by the Ghibellins, when,

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[1] Mr Justice Blackstone says, this opinion is erroneous, because the Jews were banished out of Guienne in the year 1287, and out of England in the year 1290; and in the year 1236, the use of paper-credit was introduced into the Mogul empire, in China. Com. II. 467.

Mr Macpherson states (Annals of Commerce, I. 405), that the first mention of bills of exchange in modern history occurs in 1255. The pope having quarrelled with Manfred, King of Sicily, engaged, on Henry III. of England agreeing to indemnify him for the expense, to depose Manfred, and raise his second son Edmund to the throne. The enterprise misgave. But the merchants of Sienna and Florence, who had originally advanced the money to carry it into effect, or rather to gratify the pope's rapacity, were repaid by bills of exchange, drawn on the *prelates* of England; who, although they protested they knew nothing at all about the transaction, were nevertheless compelled, under pain of excommunication, to pay the bills and *interest!*

driven from Italy by the victorious faction of the Guelphs, they retired to France and Holland. From these countries, for certain sums advanced, they gave letters of the same description on their private friends, ordering them to pay these sums to the holders of the letters, the amount of the sums in the respective places being regulated by the value of the coin exchanged. In the course of time, these letters came to be called bills, or letters of exchange; and, as many of them came back unpaid, this gave rise to the charge of re-exchange. A knowledge of the importance and utility of bills of exchange was widely diffused over Europe by the commercial operations of the Dutch; and they at length came to be employed in the mercantile transactions of all countries. The laws of exchange were established by the common consent of all trading nations, under the denomination of the custom of merchants; and the privileges of bills were ascertained by a reference to these laws, which, in a short progress of time, came to be incorporated by each state with its own municipal institutions.

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Nature and use of bills of exchange.

EXCHANGE, as a term of commerce, is a contract of money. In this sense, says Dupuis, there are properly two modes of exchange, which are lawful all over the world,—that of money against money, and that by bills. In real exchange, as it is called, there are usually four

persons concerned; two at the place where the bill is drawn, and two at the place of payment. 1. The person who delivers the money, who is called the remitter. 2. The person who takes up the money by exchange, and draws the bill. 3. The person drawn upon, who is to pay the money. And, 4. The person to whom the money is to be paid. Thus, John of Oporto has a certain sum for wine owing him by Henry of Glasgow; and James of Oporto is indebted, in an equal sum, to Edward of Glasgow, for muslins. Henry pays the money to Edward, who draws a bill on James, payable to Henry or order. This bill Henry endorses, and remits to John, who presents it to James for acceptance, and recovers payment from him when it becomes due. The price of the muslins is thus paid at Glasgow, and the price of the wine at Oporto. There is consequently a double accommodation to both debtors, proportioned to the risk and expense of transmitting money from Oporto to Glasgow, and from Glasgow to Oporto: and the creditors are also benefited, as the payments to them are thus facilitated, and an advantage given in their future transactions with the same persons. In this manner, by the intervention of bills of exchange, the whole goods in any two countries may be bought and sold without the necessity of any carriage, or transmission of specie. The commodities which one merchant exports are paid by those which another imports; and if the whole value of exports and

imports be unequal, the balance is settled by bills on a different country.

There is another mode of drawing bills, where only three parties are interested. John at Hamburgh wishes to remit a certain sum, which he owes to Henry of Glasgow; and having in that city Edward, a debtor of his, he draws a bill on Edward for the amount, payable to Henry or his order, to whom he remits the bill in lieu of the money. This is now the most usual and prevalent method of drawing bills, which arises from the extended intercourse between nations in their commercial transactions. But bills may be employed in various other ways. For instance, John in Dublin takes up money from James in that place, and gives him a bill for the amount on Henry of Glasgow, which James transmits to his correspondent in that city, who negotiates the bill, and receives payment of its contents for his constituent. Or John draws a bill on himself, payable at a certain date in Glasgow, which, being presented after his arrival there, is retired by him. Bills may also be drawn payable to the drawer or order; in which case, there are only two parties; but these partake more of the nature of promissory-notes than of the proper bill of exchange.

Exchange ascertains relative value of currency of different countries and places.

When a bill is drawn in a country using one species of coin or money of a certain value, and made payable in another, using a different species, it is strictly and properly a bill of exchange. When I give L.100 Sterling, and receive a bill

for L.140 Jamaica, or L.108 : 6 : 8 Irish currency, the exchange is strictly at par; for that is the real and intrinsic difference betwixt the money of the two countries. Whatever is given above is a premium; and whatever is given under is a discount; the rate of which varies with a thousand circumstances, and is in a perpetual state of fluctuation. The money of each country, besides its positive value, possesses a relative value, when compared with the money of other countries; and it is this relative value which exchange establishes. Whence it arises, that, besides the actual value, according to the difference of currencies given for bills from one place on another, an advance or premium is sometimes given, and sometimes a deduction from the actual value is made. This rate of premium, or discount, is generally termed the exchange between the countries, and is blended or confounded with the proper exchange, proceeding from the different currencies. In the same manner, there is an exchange, where there is no difference in the denomination of money. It is obvious, that bills drawn, to be paid in the same place or city, can produce neither exchange nor re-exchange between the inhabitants of that place or city; they are mere documents of debt, and a medium of circulation. But when bills are drawn on places more remote, though in the same kingdom, and using the same currency, they are often above what is called the money-price; and the difference between the value at

which they pass and the money-price is the rate of exchange. When the demand for payments is greater in one place than in another, the bills of the place where the payments are to be made bear a premium or advanced price in all other places. For instance, payments to be made in London, from the country towns, always exceed the payments made from it. There is always, therefore, a great demand for remittances to that city. The Glasgow merchant having a deal of money to remit to his correspondents in London, and few there to draw upon, purchases bills on London, for which he gives a premium above the money-price, in proportion to the expense of remitting specie, and the scarcity of, or demand for, London paper in the market. The usual and average rate of this premium, which is permanently in favour of London, is called the par of exchange. Were the London paper in such abundance as to equal the demand, it would sell at the money-price, which a merchant would say was below par; and were it to exceed the demand, it would sell at a discount; that is, a commission would be charged for negotiating it. Glasgow paper sells exactly at the same discount in London, as is paid by way of premium in the market for London paper in Glasgow. In London, therefore, the exchange is said to run against Glasgow. The premium, or bonus, however, on London bills, is generally enhanced by the bankers, who, being always desirous of having sufficient funds in the hands of their London corre-

spondents, to enable them to draw upon them, purchase up these bills at the market-price, and then sell their drafts on London at a higher rate, which is called the bank-price, by which they gain a profit amounting to the difference of the two prices. In proportion to this profit, the public is, or ought to be, accommodated, by being enabled at all times, through the channel of the banks, to draw upon London.[m]

Paper-money.

Bills, besides the important service they render as a vehicle of remittance, and a medium of foreign exchange, now constitute, along with promissory-notes, no small portion of the paper-currency[n] of the kingdom. As documents of debt,

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" [m] The price of foreign bills of exchange depends entirely on two circumstances, *first*, on the value of the currency at the place where they are made payable, compared with the value of the currency at the place where they are drawn; and, *secondly*, on the relation which the supply of bills in the market bears to the demand.

" If the real and nominal value of the currencies of the different nations having an intercourse together remained invariable, such fluctuations in the price of bills of exchange as arise from the first of these circumstances would be altogether unknown. But as the comparative value of the pound sterling, dollar, frank, guilder, florin, &c. is subject to perpetual variation, the price of bills of exchange must vary accordingly. Such variations, however, as proceed from this cause, affect merely their *nominal*, or rather numerical value. It is those only which arise from variations in the supply and demand for bills, or, which is the same thing, in the payments a country has to make compared with those it has to receive, that can be considered as *real;* and hence the distinctions of *nominal, real,* and *computed* exchange. The *first* depends on alterations in the relative value of the currencies to be compared together; the *second* depends on the supply of bills in the market compared with the demand; and the *third* or *computed* exchange, depends on the combined effects of the other two." —Art. " *Exchange*" in Sup. to Encyclop. Brit. p. 206.

[n] Paper-money, which is now in such universal use as to have given occasion to the saying of an exalted character in England,

their peculiar privileges and facility of transference give them a ready circulation. The great payments of our foreign and domestic commerce are made by bills on London; and a vast number of smaller bills circulate among the traders of the country, who successively indorse them to each other.[o] Bills, therefore, as a transmissible representative of property, answering all the purposes of specie, form a cheap and convenient circulating

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(and the liveliness of the metaphor could be no where more justly appreciated), that 'we eat and drink paper, and live upon paper,' seems to have been little, if at all, known to the ancients. To found a proper and secure system of paper-currency requires a settled government, and an established credit, which few of the ancient states possessed in an equal degree with some modern kingdoms. The great advantage of paper-money, as a medium of trade, it is well known, consists in its being a very cheap substitute for the precious metals, which are a very expensive one. When the circulation is kept up by paper at home, gold and silver are sent abroad, and profitably employed in a foreign traffic, where a domestic currency could be of no service.

In the continental wars in which this country has been successively engaged, an immense exportation of bullion was necessary to pay the foreign troops in our alliance; and after such drains of specie, it is probable that, without a paper-currency, our trade could not have been carried on to the same extent, or the national credit supported. The Carthaginians, in their long wars, are said to have been reduced to similar expedients, and that, to transact their commerce, they employed a fictitious money, something like our exchequer bills. "Carthage, exhausted by the large sums which she was obliged to pay to her auxiliary troops, conceived the idea of fabricating, without any metal, a species of money at least as difficult to forge as a London bank-note. The author of the dialogue entitled Eryxias, which has sometimes been attributed to Plato, and sometimes to Eschines the philosopher, observes, that the Carthaginians enclosed some unknown object in small sealed bags, which, being guaranteed by the republic, had, among merchants, a stipulated value, corresponding exactly to the paper-money of the moderns."—Rech. Phil. sur les Grecs, tom. i. p. 336. For the operations of the Romans on their money, see Esprit des Loix, liv. 22. ch. 11, 12, and 13.—A.

[o] Thornton on Paper Credit.

medium: and, by that means, tend to promote the increase, and to facilitate the operations, of the trade and commerce of the nation.[p]

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[p] Those who wish to study the subject of exchange at length, may consult Esprit des Loix, tom. iii. b. 2. c. 10.—Wealth of Nations, v. ii. b. 4. c. 1. and 3.; but particularly the article "Exchange," in the Supplement to the Encyclopædia Britannica, in which the doctrines of inland and foreign exchange, real and nominal exchange, the limit to the fluctuations of exchange, the circumstances which regulate the value of coins and bullion, the effect of favourable or unfavourable balances, and of foreign expenditure, the equalizing effects of the operations of bill-merchants, negotiation of bills, arbitration of exchange, &c. are discussed and settled in the most able and satisfactory manner. The treatise concludes (p. 226) with the following just and important observations:—

——"But whatever may have been the era of the introduction of bills of exchange, it is certain that very few inventions have redounded more to the general advantage. Without this simple and ingenious contrivance, commerce could never have made any considerable progress. Had there been no means of settling and adjusting the mutual claims of debtors and creditors otherwise than by the intervention of metallic money, (for bank-paper is only another species of bills of exchange,) a very great proportion,—many hundreds of millions,—of that capital, which is now setting productive labour in motion in every quarter of the globe, and ministering to the comforts, the wants, and the enjoyments of mankind, must have been entirely devoted to the expediting those exchanges which are much better effected by the agency of a few quires of paper. Instead of a perpetual importation and exportation of gold and silver, necessarily attended by an immensity of trouble and expense, a few bills of exchange, possessed of almost no intrinsic worth, and which may be transferred with the utmost facility, suffice to balance and adjust the most extensive and complicated transactions. But the mere setting free of an immense reproductive power, which must otherwise have been engaged in a comparatively disadvantageous employment, is only one of the many benefits which, in a commercial point of view, we owe to the use of bills of exchange. By cheapening the instruments with which commerce is carried on, they have materially reduced the price of almost every commodity; and have, in consequence, increased the command of all classes over the necessaries and luxuries of life, and accelerated the progress of civilization, by occasioning a much more extensive intercourse and intimate connexion between different and independent countries than could otherwise have taken place.

LETTERS OF CREDIT are intimately connected with Bills of Exchange in their origin and object In the course of time, and in their application to

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"In a political point of view, their effects have been equally salutary. They have enabled every individual imperceptibly to transfer his fortune to other countries, and to preserve it safe alike from the rapacity of his own government and the hostile attacks of others. The security of property has in this way been prodigiously augmented. And although we should concede to the satirist, that paper-credit has "lent corruption lighter wings to fly," it is easy to show that it has powerfully contributed to render subjects less dependent on the policy, and less liable to be injuriously affected by the injudicious and impolitic measures of their rulers. In countries in a low stage of civilization, the inhabitants endeavour, by burying all the gold and silver they can collect, to preserve a part of their property from falling a prey to the extortion of the despots by whom they are alternately plundered and oppressed. This was universally the case in the middle ages; and in Turkey, China, and other Eastern countries, the practice is still carried on to a very great extent. Some political economists have endeavoured to account for the constant importation, and high value of the precious metals in India, from the loss which necessarily attends the practice of hoarding; and undoubtedly this locking up of capital is one of the main causes of the extreme poverty of these countries. But the security derived from bills of exchange is infinitely greater than any that can possibly be derived from the barbarous expedient of trusting property to the bosom of the earth. "Pregnant with thousands flits the *scrap* unseen," and in a moment places the largest fortune beyond the reach of danger! Mr Harris was, therefore, right in stating, "that the introduction of bills of exchange was the greatest security to merchants, both as to their persons and effects; and, consequently, the greatest encouragement to commerce, and the greatest blow to despotism, of any thing that ever was invented." —(*Harris on Coins*, part i. p. 108.)

"Previous to the peace of Paris in 1763, Amsterdam, because of its commerce, the wealth and punctuality of its merchants, and their intimate connexion with all the other great trading cities of the world, was the chief place where the accounts of the different commercial countries were balanced and adjusted. But the entire loss of foreign trade, and the other vexations to which Holland was subjected during the ascendency of the French, has nearly divested Amsterdam of all share in this business. London

mercantile purposes, some change has been introduced in their form and use. It was therefore thought proper to treat of them in a supplementary chapter.

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has now become the trading metropolis of Europe and of the world. The vast extent of its commercial dealings has necessarily rendered it the great mart for bills of exchange. Its bill-merchants, a class of men remarkable for their shrewdness, and generally possessed of large capitals, assist in trimming and adjusting the balance of debt and credit between the most remote countries. They buy up bills where they are cheap, and sell them where they are dear; and, in consequence of the extent of their correspondence, and the magnitude of their transactions, have given a steadiness to the exchange, to which it could not otherwise have attained."

# CHAP. I.

## DESCRIPTION AND FORM OF FOREIGN AND INLAND BILLS OF EXCHANGE AND PROMISSORY-NOTES.

### SECT. I.

### *Of Foreign and Inland Bills.*

Parties to foreign bills.

A FOREIGN bill of exchange may be defined to be an open order, or letter of request, by which a person in one country desires his correspondent in another, to pay a specified sum of money to a third party, or to any other to whom that third party shall direct payment to be made.[a] He who makes out the bill is called the *drawer;* he to whom it is addressed, the *drawee;* and the person in whose favour it is drawn, the *payee.* If the drawee undertake to pay the amount, he is then called the *accepter;* and if the payee appoint another to receive the money, that other is termed the *indorsee,* as the payee is with respect to him

[a] Stair, Inst. b. 1, tit. 11. § 7.—Ersk. Inst. b. 3. tit. 2, § 25.

the *indorser;* and any one who happens for the time to be in possession of the bill, is called the *porteur*, or *holder* of it. The bill, before it is accepted, goes often by the name of a *draft;* and, after it is accepted by the drawee, it is frequently denominated his *acceptance.*

Time of payment.

The period of payment is either at a certain distance after its date, or after sight, or at sight, or on a certain specified day, or on demand, according to the intention and agreement of the parties, and the distance of the countries in which they reside. Before bills of exchange came to be of such varied and extensive use as in the present day, it was customary to make all the bills from one place to another payable after the same interval of time, which was called the *usance* (usage) between the countries.[b] Usance is the period of one, two, or three months after the date of the bill, according to the custom of the places between which the exchanges run.[c] Double or treble usance, is double or treble the usual time, and half-usance is half the time. When the usance is one or more months, and it is necessary to divide a month, half-usance is uniformly fifteen days, without regard to the inequality of the months.[d] In France, usance of one month is always thirty days.[e] Usance between Great Britain, and Hamburgh, Amsterdam, Rotterdam,

Usance.

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[b] Savary, Lettres de Change, tome i. liv. 3. ch. 5.
[c] Malyne, Cons. vel. Lex. Mercat. part 3. c. 4.
[d] Marius, Advice concerning Bills of Exchange, p. 93.
[e] Ord. de Commerce, 1673. tit. 5. art. 5.

and Altona, is one calendar month from the date of the bill;[f] between Great Britain and France thirty days;[g] between Great Britain and Cadiz, Madrid, and Bilboa, two months; between Great Britain, and Leghorn, Venice, Rome, and Genoa, three months; between Great Britain and Russia, there is no established usance. Bills from Constantinople and Smyrna upon Great Britain, are usually drawn at thirty-one days. From North America at sixty days; and from the West Indies at ninety days.[h] Upon a bill payable at usance the time is to be counted exclusive of the date of the bill.[i] Foreign bills are sometimes, but not often, drawn payable at sight, in which case the bill ought to express that it is payable according to the course of exchange at its date.[k]

Time computed by *calendar* not *lunar* months.

When a bill is payable months after date or sight, the time is to be computed by calendar, not lunar months. Thus, if a bill be dated 1st January, payable one month after date, the month expires on the 1st of February. If dated the 28th, 29th, 30th, or 31st January, payable one

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[f] The usance between Britain, and Antwerp, Brabant, Flanders, and Holland, is also one month; and between Britain, and Spain and Portugal, two months.—Chitty, (Ed. 1822,) 267.

[g] Poth. Traité du Change, n. 15. Boucher, Inst. Com. n. 1649.

[h] The usance between Amsterdam, and Brabant, France, Flanders, and Holland, or Zealand, is one calendar month,—between Amsterdam, and Italy, Spain, and Portugal, is two calendar months;—and between Amsterdam, and Frankfort, Nuremburgh, Vienna, and other places in Germany, on Hamburgh and Breslau, fourteen days after sight,—two usances twenty-eight days,—and half-usance seven days.—Chitty, 267.

[i] Poth. n. 15.

[k] Boucher, n. 1165.

month after date, the month expires on the 28th February in common years; and in the three latter cases, in leap-year, on the 29th. A bill dated 30th April, payable three months after date, is accordingly due on the 30th July, and ought to be protested on the 2d of August.[1]

Where a bill is drawn by days, the day on which the bill is dated, if payable after date, or accepted, if payable after sight, is excluded.[m] Thus, if a bill payable ten days after date or sight, be dated or presented on the 1st of January, the ten days expire on the 11th. When a bill is payable weeks after date, the weeks must be reduced to days, and the time computed accordingly. If a bill, therefore, be dated 1st January, payable six weeks after date, the six weeks expire on the 42d day, exclusive of the day of the date, being the 12th of February; and the bill, by the addition of the days of grace, becomes due on the 15th.

Days of grace.

The days of grace which are allowed to the person on whom the bill is drawn, were, it is probable, at first gratuitous on the part of the holder; whence, apparently, the term is derived. But the custom of merchants, and the decisions of courts of justice, have established, that the ac-

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[1] 1803, Jarron *a.* Smith, Fac. Coll. No 112. p. 246.—Mor. App. to Bill, No 14.

[m] Beawes, Lex Mercat. n. 252.—Poth. n. 13.—Kyd, Treat. p. 7.—Thus in May *v.* Cooper, Fort. 376, a note payable ten days after date, and dated 21st July, was considered to be due 31st (not including days of grace.)

cepter is entitled to them as a matter of right.[n] The number of these days varies according to the custom of different places. The following is a list of the days of grace in different countries, given by Beawes in his Lex Mercatoria.

| | DAYS. |
|---|---|
| Great Britain, Ireland, Bergamo, and Vienna, | 3 |
| Frankfort, out of the fair time, - | 4 |
| Leipsic, Naumburg, and Augsburgh, | 5 |
| Venice, Amsterdam, Rotterdam, Middleburg, Antwerp, Cologn, Breslau, Nuremburgh, and Portugal, - - | 6 |
| Naples,[o] - - - - | 8 |
| Dantzick, Koningsberg, and France, | 10 |
| Hamburgh[p] and Stockholm, - - | 12 |
| Spain, - - - - - | 14 |
| Rome, - - - - - - | 15 |
| Genoa, - - - - | 30 |

[n] 1788, Charles *a.* Skirving, &c. Fac. Coll. No 27. p. 44.—Mor. 1614.—Poth. n. 187. 'Ce terme qu' accorde l'ordonnance,' says this writer, 'n'est terme de grace que de nom, parceque c'est *humanitatis ratione* qu'elle l'a accordé, et pour distinguer de celui porté par la lettre; il est réellement terme de droit, puisque c'est la loi qui le donne.' It appears, however, that in Scotland, bills may be protested on *any* of the days of grace, though not on the day the bill is due. See Ersk. b. 3. tit. 2, § 33, and the decision above quoted, (See post ch. vii.) In England, a bill protested before the last day of grace does not entitle the holder to exact the dues of the protest from the accepter, who is allowed till the last day to pay it; and this, it is believed, is also the consuetudinary law of Scotland.—A.

[o] According to Boucher, bills on Naples payable at sight, have no days of grace, and others have only three; and at Leipsic a bill must be protested the day it is due, p. 268.—A.

[p] See Note [r].

In Milan there are no fixed days of grace; but the holder of the bill may grant some days, provided it be done before a notary.[q] Bills on Geneva have five days of grace. At Leghorn, when a bill falls due it is commonly retired on what are called the pay-days, which are twice a-week, Tuesdays and Fridays. Thus, a bill due on Saturday is payable on the Tuesday following; or, if due on Wednesday, is payable on the subsequent Friday. The payment is generally made at the *stanzas*, places appointed for the purpose, where the rate of exchange at the time is ascertained. But in several of the places mentioned in the above list, the days of grace are not claimed or taken. In Hamburgh, for instance, a merchant in good credit retires his bill the day it falls due; and to allow it to lie over during the days of grace is thought discreditable. No diligence, however, can proceed on the bill till the days of grace are expired, and the day on which the bill becomes due makes one of these days, which is the case no where else.[r] In Great Britain, Ire-

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[q] Boucher, p. 269.

[r] See Bayley, 199.—Goldsmith and another *v.* Shee, C. P. cor. Lord Eldon, 20th Dec. 1799.—A bill for £500, drawn on Katter at Hamburgh, at three usances, was dated 25th June 1799. It was presented for payment on the 4th of October, which was a post-day. In an action by the indorsees against the payee, the defence was, that the presentment was improper; but it was proved in evidence as the settled usage at Hamburgh, that although it is usual to pay bills on the day they become due, the holder may, if he pleases, keep them a certain number of days, called respite-days; and that the number of respite-days is eleven, where the eleventh is a post-day; but where the eleventh is not a post-day, the respite-days extend to the preceding post-day

land, France, Geneva, Amsterdam, Rotterdam, Antwerp, Middleburgh, Dantzick, and Konings-berg, Sundays and holidays are always included in the days of grace. Bills on Russia have ten days of grace, and unless a protest be taken within the ten days, the holder loses his right to the *cambio*, or eight per cent. exigible on protested bills. In that country, bills are looked upon more as documents of debt, than as possessing those peculiar privileges, with which, in order to expedite and favour the affairs of commerce, they have by other nations been invested. The native Russian merchant, therefore, is extremely careless about the protesting of his bills, and is al-

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only, the holder being obliged, at his peril, to protest, and send off the protest by the eleventh day.—Verdict for the plaintiffs.

But this is not consistent with the Hamburgh ordinance, Art. 17, in which it is stated, that the holders may postpone the protest until the twelfth day, if it be not a Sunday or holiday.

Goldsmith and another *v.* Bland and another, C. P. cor. Lord Eldon, 1st March 1800. A bill for L.998 : 9 : 9, drawn on Treviramus of Bremen, but payable in Hamburgh at three months, was dated the 15th June 1799; it was not presented or protested until the 26th of September, which was not a post-day. Another bill for L.261 : 7 : 2, addressed to Voeg in Lubeck, payable in Hamburgh at three months, was dated the 26th June 1799; it was not presented or protested until 7th October, which was not a post-day. In an action on these bills against the defendants as indorsers, it was proved that it was optional in the holder of a bill at Hamburgh, whether he would present and protest it on the post-day before the eleventh day after the day limited for its payment, the eleventh not being a post-day, or whether he would keep it until the eleventh; and one witness proved, that where the drawee lived at Lubeck or Bremen, it was the constant usage to keep the bill until the eleventh, whether it was a post-day or not, there being posts from Lubeck and Bremen to Hamburgh every day.—Verdict for the plaintiffs for L.1633.

The day on which a bill falls due is counted as one of the days of grace in *France*, as well as at Hamburgh.—Chitty, 266.

ways inclined to avail himself of the days of grace. He is animated with little of that punctilious regard for his mercantile honour and credit, which is the laudable characteristic of a respectable merchant in other European states, and especially in this country.

In Scotland, when the third day of grace happens to be Sunday, the bill must be protested (if not paid) on the Saturday preceding.[s]

Old and new style.

The different calendar computations of time must also be attended to in regard to foreign bills of exchange. Most, if not all, the countries with which Great Britain is in the habit of commercial intercourse, have now adopted the Gregorian, or new style, in computing time, except Russia, where the Julian or old style (which is at present twelve days behind the new) is still used.

When a bill is drawn payable after date upon a place using a style different from that observed where the bill is drawn, the time, it is said, must be computed according to the style of the place drawn upon.[t] If this were the case, a bill drawn from this country on Petersburgh, dated 1st April, payable one month after date, would not

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[s] 1786, Smith & Payne *a* Laing, Arthur, & Co. Fac. Coll. No 282, p. 434.—Mor. 1612.

It appears that in England, on bills payable to the excise, it is customary to allow six days beyond the days of grace, if required by the acceptor, on payment of a shilling to the clerk at the expiration of the six days, for his trouble. And it was held by Lord Mansfield, in Welford *v.* Hankin, 1763, 1 Esp. 59, that as this custom was general, the granting of this indulgence by the commissioners of excise did not free the drawer.—Chitty, 266.

[t] Beawes, n. 251.—Poth. n. 155.—Chitty, 263.

be due till the 1st of May there, which corresponds with the 13th of May here; while a bill drawn from Petersburgh on this country, dated 1st April, payable one month after date, would be due on the 1st of May here, which corresponds with the 18th of April there. A difference of twelve days therefore would evidently take place, from the modes of drawing on the two countries. To obviate this disparity, and equalize the difference of time arising from the use of the two calendars, it seems necessary and reasonable that the date should be regulated by the style of the place where the bill is drawn, and calculated back, or carried forward, to correspond with that style. And this, accordingly, is both conformable to the opinion of the other authors,[u] and to the general practice. For example, on a bill drawn at Petersburgh, dated 1st April old style, and payable here one month after date, the time must be computed from the 13th April new style; and, on a bill dated 13th April new style, payable at Petersburgh one month after date, from the 1st April old style. The date is sometimes made both according to the old and new style, the one being written above and the other below, with a small line between them, thus:

$\left.\begin{matrix}\frac{1}{13}\ \text{N. S.}\\ \text{O. S.}\end{matrix}\right\}$ April 1807. Or 1st April O.S. $\frac{1}{13}$ April.

This mode was also for some time practised French style.

[u] Mar. 89.—Bayley, 201.—Kyd, 8. But if the time of payment be not counted from the date, the contrary rule applies. —Bayley, *ib.*

by the French in drawing bills on other countries. The date was first put according to their modern calendar, and then the corresponding date according to the style of the place drawn upon, thus:

$$\text{Bordeaux le } \left\{ \begin{array}{c} \text{premier Vendemiaire an 12.} \\ \hline \text{6 Octobre - - 1803.} \end{array} \right\}$$

They have now, however, returned to the use of the common calendar in dating and endorsing their bills, which, it is presumed, they find a a great deal more convenient.

Bills drawn in sets.

As a precaution against the risk of miscarriage, foreign bills of exchange are usually drawn in sets; that is, two or three, and sometimes four bills are drawn, of the same tenor and date, each of which contains a condition that it shall be payable only so long as the others remain unpaid.[v] When a bill thus consists of a set, or several parts, each part must be delivered to the person in whose favour it is drawn, unless one is forwarded to the drawee for acceptance, in which case the others must be delivered; otherwise difficulties may arise in negotiating the bill, or enforcing payment.[w] These bills are generally transmitted by different conveyances; and any one of them being paid, the others are of no effect. But if the drawer should have only given

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[v] The condition should be inserted in each bill of the set; otherwise the payment of that in which the condition is inserted will be no defence against a *bona-fide* holder of the bill not containing the condition.

[w] Molloy, b. 2. c. 10. § 10.

one bill, he will, if it should be lost, be obliged to give another of the same tenor to the loser;[x] in which case, however, he ought to be careful in exacting security against the re-appearance of the first; for, if it comes into the hands of *bona-fide* holders, he may be subjected in payment of both.[y]

## INLAND BILLS.

Inland bills.

An inland bill of exchange, is a bill drawn and made payable in the same country. Inland bills differ chiefly from foreign, in this respect, that they are usually drawn single, there being but one of the same tenor and date, and have often but two parties to them, the drawer and accepter.

Law of bills of exchange.

The facilities given to commerce by the use of foreign bills of exchange, procured them, at an early period, peculiar privileges in all the European states. The parties being of different kingdoms, questions concerning these bills came to be decided according to the received usages of trading nations; and the law with regard to them was, of course, derived more from the general practice of the mercantile people, than from any existing civil code, or municipal regulation. From being used in carrying on foreign com-

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x Poth. n. 39.

y 1799, Lambton and Co. *a.* Marshall, &c. Fac. Coll. No. 132. p. 302. Mor. App. to Bill, n. 8.

merce, bills came soon to be employed in transacting the internal trade of the country. But in that capacity their operation was at first much more confined than at present; and, both in England and Scotland, it was some time before they were considered as entitled to the same privileges with foreign bills. At length, however, a growing conviction of their utility in all mercantile dealings, seems to have induced the legislature of this country, in 1696,[z] to put them on the same footing with foreign bills; and since that time, all bills of exchange, inland or foreign, have been considered as possessing the same force and privileges by positive law; and the custom of merchants relative to the one held as applicable to the other.[a] In England, inland bills were privileged in 1697;—9 and 10 Will. III. cap. 17.[b]

Origin of inland bills.

English and Scots inland bills.

An English inland bill has generally three parties to it,—the drawer, accepter, and payee; whereas, in Scotland, most of the inland bills have at first but two parties,—the drawer and accepter; and they are made payable to the drawer or his order. A Scotch inland bill of this description, therefore, bears a nearer resemblance to a promissory-note, than to an English

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[z] Act 36. § 6. Parl. Will. III.

[a] 1748, Tudhope *a.* Turnbull, Kilkerr. (Bill of Exch.) No. 16. p. 81. Mor. 1510. In this case it was decided, that an inland bill, though not *in re mercatoria,* but for money lent, and though payable twelve months after date, was entitled to the privileges of a bill of exchange.

[b] Also 3 and 4 Anne, c. 9.

inland bill; and seems evidently to have been adopted, in this country, to supply the place of promissory-notes, which were not privileged till long after they were so in England. It was looked upon more as a document of debt, than a proper bill of exchange, among merchants; and was often used as a form of security by people not in the least connected with trade.

Form and essentials of bills.

It may be observed, in general, that no precise form or set of words is necessary to constitute a bill of exchange. Of all obligations, they have, for the sake of commerce, been most favoured by our law-courts, and effect given to them in whatever shape they have been made out, provided the true nature of a bill was preserved. It is, however, advisable, in drawing a bill of exchange, that the following points be attended to, some of which are essential to its validity. 1*st*, That, in certain cases, it be on a proper stamp. 2*d*, That the date be correct. 3*d*, That the place where it is drawn be mentioned. 4*th*, That the sum be expressed distinctly, both in figures and words, and no blank left to allow of any alteration or augmentation of the sum. 5*th*, That the time of payment be clearly expressed. 6*th*, That it contain an order or request to pay. 7*th*, That in the case of foreign bills drawn in sets, each bill contain the proviso, that it shall only be payable in case the others are not paid. 8*th*, That it be distinctly specified to whom the bill is payable, and the name properly spelled. 9*th*, That in all inland bills, a place of payment

be inserted. 10*th*, That, in certain cases, value received be expressed. 11*th*, That, in particular circumstances, it be stated whether the bill is to be paid with or without further advice. 12*th*, That the drawer's name be clearly signed. 13*th*, That the bill be properly addressed to the drawee. And, *lastly*, That in foreign bills, it be observed that the place where the drawee lives be correctly described. All which will be better explained by the following forms.

No I.

Exchange for L.500 Sterling. *Glasgow, 6th February* 1806.

At usance, pay this our first of exchange, (second of the same tenor and date not paid,) to the order of Messrs Hamilton, Smith, and Co., the sum of five hundred pounds Sterling, at the exchange, as per endorsement,[c] value in account, as advised by

*To Messrs Denovan & Spaden, merchants, Hamburgh.* } DALRYMPLE & ELLIS.

Payable at

No II.

*London, 8th May* 1807. Exch. p. L.500 Ster. at 34s. 8d. p. pound.

Three months after date, pay this my second of exchange, (first of the same tenor and date not paid), to the order of Mr G. Van Haveracht, the sum of five hundred pounds Sterling, at 34s. 8d., value in account, as per advice.

*To Messrs Flor & Co., merchants, Hamburgh.* } WM. RICHARDSON.

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[c] As the rate of exchange of the day cannot be known till information be received from London, the bill is generally sent thither, and the rate marked there on the back of the bill.—A.

No III.

£250 Sterling. *Glasgow, 7th April* 1807.

Twenty-one days after sight, pay this my only bill of exchange, to Mr John O'Reilly, or order, two hundred and fifty pounds British, at the current exchange, value in account, and place it to my account, without further advice from

*To Mr John Beresford, merchant, Dublin.* } JOHN BROWN.
13th April. Accepted.
J. BERESFORD.

FORM OF AN INLAND BILL.

£130 Sterling. *Edinburgh, 6th May* 1807.

Three months after date, pay to me or my order, at my shop here, the sum of one hundred and thirty pounds Sterling, for value received.

*To Mr Alexander Campbell, merchant, Leith.* } WM. DREW.
ALEX. CAMPBELL.[c]

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## SECT. II.

### OF PROMISSORY-NOTES.

Form of, and parties to promissory-notes.

A PROMISSORY-NOTE is a direct obligation in writing, by which one person promises to pay to another, or to his order, a certain sum of money, within a specified time, or on demand. With the exception of promissory-notes admitting of no acceptance, the parties to them are similar to those concerned in a bill of exchange. Before a promissory-note is endorsed, the granter of it is,

[c] For additional forms of bills, foreign and domestic, see Appendix, No I.

with respect to the person who receives it, to be considered as occupying the place both of the drawer and drawee of a bill. When the note is endorsed, the endorser corresponds to the drawer; the granter to the drawee or accepter; and the endorsee to the payee, or party to whom the bill is made payable. In France and England,[a] promissory-notes were put upon the same footing with bills of exchange, long before a similar privilege was extended to them in Scotland.[b] It has been well observed by an English writer,[c] that as commerce advanced in its progress, the multiplicity of its concerns required, in many instances, a less complicated mode of payment, and of obtaining credit, than through the medium of bills of exchange, to which there are in general three parties. A trader, whose situation and circumstances rendered credit from a merchant or manufacturer who supplied him with goods absolutely necessary, might have so limited a connexion with the commercial world at large, that

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[a] In France, the law of promissory-notes (billets de change) is regulated by the ordonnance of 1673, &c. In England, promissory-notes were put on the same footing with inland-bills by 3d, 4th Anne; made perpetual by 7th Anne, c. 25. § 3.—A.

[b] In the first decision which is reported regarding promissory-notes, Arbuthnot *v.* Scot, 29th January 1708, Mor. 12255, the note was found to be improbative, as wanting the names and designations of the writer and witnesses. Though this was departed from in subsequent cases, it was still held, prior to the year 1772, that promissory-notes had none of the privileges of bills, and that pleas of compensation and arrestment were proponable against onerous holders of them. See title "Promissory-Note" in Mor. Dict., where the cases are collected.

[c] Kyd, p. 18.

he could not easily furnish his creditor with a bill of exchange on another man, while his own responsibility might be such, that his simple promise of payment, reduced to writing for the purpose of evidence, might be accepted with equal confidence with a bill on another trader. Hence the introduction of promissory-notes; and hence, as before observed, the expedient devised by the Scotch merchants, of drawing their inland-bills, so as to be the same in effect with promissory-notes, while their form secured to them, at the same time, all the privileges of bills. By these inland-bills, almost all the purchases and mercantile dealings in Scotland have for a long period been transacted; and though promissory-notes were, in the 12th year of the reign of his present Majesty, indued by statute,[d] with the same privileges as bills of exchange, they still continue to be in general use.

Law of promissory-notes and bills the same.

As bills, therefore, and promissory-notes, may now be considered as virtually the same with respect to their privileges, the rules and decisions relative to the one may be held as applicable to the other, which will render it unnecessary to treat of them separately. In the subsequent

[d] By a temporary statute, 12th Geo. III. c. 72, made perpetual by 23d Geo. III. c. 18. § 55, it is enacted, § 56, "that from and after the 15th May 1772, the same diligence and execution shall be competent, and shall proceed upon promissory-notes, whether holograph or not, as is provided to pass upon bills of exchange and inland-bills, by the laws of Scotland; that promissory-notes shall bear interest as bills, and shall pass by endorsation; and that the endorsers of promissory-notes shall have the same privileges as the endorsers of bills, in all points."

pages, of course, they will be classed together; and, unless in some particular cases it is found requisite to draw a line of distinction between them, it may be laid down, in general, that the law, when stated to have been settled with respect to the accepter of a bill, is to be considered as applying to the granter of a note; when with respect to the drawer of the bill, then to the first endorser of the note; the subsequent endorsers and endorsees bearing an exact resemblance to each other.

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FORM OF THE PROMISSORY-NOTE.

£100 Sterling. *Glasgow, 7th April,* 1807.

Three months after date, I promise to pay Mr William Middleton, or order, at his counting-house here, the sum of one hundred pounds Sterling, for value received.

WM. JOHNSTON.

£150 Sterling. *Glasgow, 7th April* 1807.

By equal instalments,[e] at three, six, and nine months after date, I promise to pay James Dennistown, Esq., or order, at his counting-house here, the sum of one hundred and fifty pounds Sterling, for value received.

WILLIAM SPENS.

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[e] In the case of the Carron Company *a.* Muirhead, 1796, February 26th, (Mor. 1457,) it was doubted whether a promissory-note, payable by instalments, has the statutory privileges of bills. The Court did not, in that case, decide the point; but it may be presumed, from analogy, that such notes are entitled to these privileges. Bills payable by instalments have long been used among merchants without challenge; and as, by the 12th Geo. III., promissory-notes are invested with the same privileges as inland-bills, it does not appear upon what grounds notes, payable by instalments, should not have equal validity with bills payable in the same manner.—A.

Bank-notes.

BESIDES the promissory-notes above described, used by merchants in their dealings with each other, there are promissory-notes of another description, payable to the bearer on demand, which may be reissued after payment. These, by way of distinction, are called cash-notes, and may be circulated in any number by the public banks, or by private bankers, or by any other person whose credit is such as to make them be taken in payment.[f] Bank of England notes are considered as cash; and the notes of private bankers, when the issuers of them are known and in good credit, pass as ready money. Promissory-notes received from bankers, for money deposited in their bank, though negotiable by endorsement, are seldom transferred in that way, being in general held as an acknowledgment and document of debt. They are granted by the bankers as a security for the money lodged; and commonly contain a clause to pay the stipulated rate of interest.[g]

[f] By 55th Geo. III. c. 184, § 14, it is declared, that notes payable to the bearer on demand, for sums not exceeding L.100, may be reissued by bankers without payment of any additional duty.

[g] Bills and promissory-notes were originally written on plain paper. By the 23d Geo. III., certain duties were imposed, which required that they should be written on paper duly stamped. By subsequent statutes, these duties were taken off, and others imposed in their stead. For the duties payable at present, by 55th Geo. III. c. 184, see Appendix, No II.

Drafts on bankers.

*Drafts*, or checks, upon accounts with *bankers*, are not in such general use in Scotland as a circulating medium, as in

England. They are in the simple form of an order on the banker to make payment on demand of a certain sum from the granter's account, and are understood to be payable to the bearer. By the present stamp-act, schedule, part I., tit. Bills of Exchange, they require no stamp, provided they be drawn on a banker, or person acting as a banker, who shall reside within ten miles of the place where such drafts are issued, the place being specified in the draft; and provided they shall bear date on or before the day on which they are issued, and do not direct payment to be made by bills or promissory-notes.

It may be observed in general, that drafts are transferable by endorsation, in the same manner as bills, and that nearly the same rules are applicable to both. It is settled in England, that, to preserve recourse against the granters, they must be presented for payment, at the latest, on the day after they are received.—Chitty, 274.—In M'Gilchrist *v.* Arthur, 16th January 1794, Mor. 877, it appeared that James Fife had, on 23d February, granted, without value, to Archibald Macausland, a draft on his banker for L.100. Macausland endorsed it, for value, on 24th February, to M'Gilchrist, who presented it for payment on 5th March. But by this time Fife had withdrawn his money from the hands of the bank, (by which step he was precluded from founding on the want of due negotiation,) and the draft was in consequence dishonoured. The liability of Fife in recourse was discussed in a suspension, conducted by the trustee for his creditors. The competency of a summary charge upon such a note having been disputed, the Lord Ordinary turned the charge into a libel, (see ch. x. last note,) and found the defender liable in the sum contained in the draft, with interest. A reclaiming petition to the Court having been presented, it was observed on the Bench,—"The draft in question is transferable like a bill of exchange. It is equally free from compensation with a bank-note. It falls under the class of 'notes of trading companies,' which are exempted from the enactments of the statute 1696. Besides, the drawer having issued his order in these terms, is barred, *personali exceptione,* from objecting to the negotiability of it, and the trustee for his creditors cannot be in a better situation." The petition was refused without answers.

# CHAP. II.

## OF THE COMPETENT PARTIES TO BILLS AND NOTES.

Competent parties to bills.

BILLS OF EXCHANGE, like other contracts, can only be valid when executed by persons qualified to bind themselves. Only such, therefore, as are capable of personal obligation can be proper parties to bills and promissory-notes. As the consent of parties is implied in every obligation, those who are by law deemed incapable of consent, as persons under age, or *non compos mentis*, cannot bind themselves by contract. Consequently, bills accepted or negotiated by pupils, idiots, and lunatics, have, with regard to themselves, no validity.

Pupils, &c.

Married women.

Married women, too, have no power to grant bills, or any other security bearing interest, so as to bind themselves or their husbands.[a] Nor can they, even with concurrence of their husbands, subject themselves to personal obligations of any

[a] 1749, Forrest *a.* Earl of Sutherland, Dict. 3, 283. Mor. 478.

sort during marriage;[b] and they are not liable to personal diligence.[c] In certain cases, however, a married woman is considered as having an existence independent of her husband, and, among other contracts, may bind herself by bill. 1. Where the wife has got a separate stock, exempted from the *jus mariti*, or husband's right of administration, she may bind herself to the extent of that stock.[d] 2. Where there is a legal or vo-

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[b] Dict. v. 1. p. 398. 1761, Menzies *a.* the Creditors of Gillespie, Fac. Coll. No 67. p. 151. Mor. 5974. 1772, Watson *a.* Robertson. Mor. 5976. 1791, Harvey & Fawell *a.* Trustees of Chessels, Dict. v. 3. p. 284. Mor. 5980.

[c] 1738, Gordon *v.* Pain & Husband, Kilker. 256. Mor 6079. 1790, Chalmers *v.* Douglas & Husband, Fac. Coll. No 117. p. 238. Mor. 6083.

[d] It has been repeatedly decided that a wife may lawfully grant securities over her separate property in favour of her husband's creditors. See cases in note [b]. Eleis *a.* Keith, 15th Dec. 1665. Marshall *a.* Ferguson, Dec. 1683. Mor. 5990.

But the personal obligation contained in such securities, or in personal bonds or bills granted by a wife in conjunction with her husband, are void and null, both as to diligence against her person and estate. L. of Ulysseshaven *v.* Lady Bonnington, 1611. Mor. 5957. Birch *v.* Douglas, 1663. Mor. 5961. Duncan *v.* Forbes, 1705. Mor. 5966. Eleis *v.* Keith, *sup.* Ker *v.* Shearers, 1715. Mor. 5991.

Whether a wife's personal obligations, by bond, bill, or otherwise, granted by her in relation to the administration of her separate property, are valid to the effect even of authorising diligence against her estate, does not seem to be clearly fixed. Without doubt, such obligations cannot, during the subsistence of the marriage, be grounds of diligence against her person. In Watson *v.* Robertson, *sup.*, where two sisters had granted a bond over certain heritable property, with the consent of the husband of one of them who was married, the creditor, after the death of the married sister, proceeded to lead an adjudication of the property, upon the *personal obligation* contained in the bond. But the Court found, "that an adjudication cannot proceed on the personal obligation of a wife *stante matrimonio.*" The statement in the text, that a wife may bind herself by bill in relation to her separate property, may therefore be questioned. At

luntary separation, and a yearly sum has been settled upon the wife by the husband as a separate maintenance, her personal obligations during their separation, are effectual against her; but no diligence can proceed on such obligations against her person.[e] 3dly, Where the husband having left the country, and the wife enters into trade, receives credit, and contracts debt in her own name, for the purpose of maintaining herself and family, she becomes liable for these debts, and diligence is competent against her for the recovery of them; 1789, Churnside *a.* Currie, Fac. Coll. No 78. p. 141,—Mor. 6082. In the case just quoted, the husband having left Scotland in bankrupt circumstances, the wife engaged in trade, in order to earn a subsistence for herself and children. Being charged with horning for payment of a bill of exchange, she suspended, on the ground that a married woman cannot, by contract, subject herself to personal diligence. This plea, however, was entirely disregarded as inapplicable to a case like the present, where the debt had been contracted by a wife in her own name, while her

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the same time, as it would be contrary to equity that a wife's property should not be attachable for sums which have been laid out for her own benefit, redress would probably be given in an action by the creditor, in which he might prove that the sums advanced by him had been employed beneficially in the wife's affairs, and obtain a decree to the effect of enabling him to attach her property. See Harvey and Fawell *v.* trustees of Chessels, *sup.* See also Bruce *v.* Paterson, 23d January 1678. Mor. 5965.

A wife's separate debts can, on the dissolution of the marriage, be recovered by diligence against herself and her estate. Primrose *v.* Watson, 13th January 1610. Mor. 5982. Neilson *v.* Arthur, 23d February 1672. Mor. 5984.

[e] Ersk. b. 1. t. 6. § 25.

husband was out of the kingdom. To refuse the ordinary legal compulsitories in such circumstances as these, would, it was observed, in the end, prove hurtful to the women themselves, by preventing them from gaining a livelihood in trade, at a time when their husbands could not afford them any support. The bill of suspension was refused by the Lord Ordinary, and the Court affirmed the judgment.[f]

By the law of Scotland, all the moveable property of the wife (with the exception of articles of dress and ornament) falls, at marriage, under the *jus mariti*, or right of administration of the husband; and he becomes responsible for her debts. He is therefore liable for bills granted by the wife before marriage;[g] and, on the same principle, is entitled to pursue for payment of bills

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[f] See to the same effect, Gairns *v.* Arthur, 19th Dec. 1667. Mor. 5954. Hay *v.* Corstorphine, 23d June 1763. Mor. 5956. Cases of Bold and Dall, Mor. 6002.

In one case, a wife has it in her power to bind her husband during the subsistence of the marriage, viz. where, with his express or tacit consent, she has either managed a branch of his business, or carried on traffic on her own account. Obligations granted by her in these situations do not bind herself, but her husband. Ersk. b. 1. t. 6. § 26. See also Cotes *v.* Davis, 1 Camp. 485.

A wife is presumed to be intrusted with the management of the household affairs, and therefore the husband is liable for all furnishings ordered by her for the use of the family. A loan of money to her for that purpose is in a different situation, and the lender would probably be required to prove that it was necessary, and was actually applied to the family affairs. In Mitchelson *v.* Lady Cranstoun and husband, 12th Dec. 1780, Mor. 5886, it was found, that the husband alone is liable for such debts.

[g] 1725, Lesly *a.* Nicholson, Kames, R. D. v. 1. No 55. p. 105. Mor. 5766.—His liability ceases upon the dissolution of the marriage. Ersk. b. 1. t. 6. § 16.

granted before marriage in her favour.[h] It has also been decided, that a bill to a wife during marriage, bearing exclusion of the *jus mariti*, is effectual, where it is for money that does not fall under it.[i]

Minors.

All deeds and contracts granted or entered into by a minor, without consent of his curators, are null with regard to him, but obligatory on the other parties, if judged beneficial to him. When a minor has no curators, his deeds are as effectual as if he had curators, and acted with their consent; but he is allowed to be restored against all deeds executed by him during minority, that are prejudicial. Where such deeds have been granted by a minor, with concurrence of his curators, or by one who had no curators, in both cases he is entitled to do them away by an action of reduction within four years after his majority.[k] But though a minor has the privilege of restitution, in this way, against all obligations arising from contract, by which his interests may be injured, yet, when he engages in any trade or profession, he is not allowed to challenge deeds

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[h] 1738, Gilhagie *a.* Orr. Mor. 1421. Session Papers in Advocates' library.

[i] 1750, Mungal *a.* Calder, Kilker. (Husb. & Wife,) No 17. p. 269. Mor. 5771.

[k] Though minors are precluded from restitution with respect to deeds which they have ratified or tacitly approved of after majority, it was found that a minor, who, in his nineteenth year, had granted certain bills jointly with his father, and had, within fourteen days after majority, settled accounts, in which these bills were stated as articles, was not, by this slight act of homologation, debarred from insisting for restitution *in integrum.* 1782, Melvil *a.* Arnot, Fac. Coll. No 51. p. 80. Mor. 8998.—A.

granted in the regular exercise of his business. Thus, bills of exchange accepted by a minor, who is a merchant or trader, are presumed to have been given for value advanced to him in the course of trade.[1] For were not this presumption admitted, a minor merchant could not deal otherwise than by ready money; which would in effect be saying, that a minor cannot be a merchant. Action, too, was sustained on a bill granted by a minor holding a commission in the army, for certain articles purchased by him from a toyman, though the articles were either entirely useless to the minor, or unnecessary in his situation, and though the persons liable by law to aliment him could not have been obliged to pay for them.[m]

A minor, though married, cannot be a party to a bill, if he be not a merchant.[n] But though a bill is drawn, endorsed, or accepted, by a person who cannot bind himself, it will nevertheless be valid against all those who are competent parties to the instrument.[o]

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[1] 1732, Craig *a.* Grant, Dict. v. 1. p. 585. Mor. 9035. Grieve *a.* Tait, ibid. 585. Mor. 9036.

[m] 1782, Johnston *a.* Maitland, &c. Fac. Coll. No 69. p. 107. Mor. 9036. See also Heddell *v.* Duncan, 5th June 1810. Fac. Coll.

[n] Boucher, n. 1250. It will be sustained so far as the sum borrowed has been employed beneficially. Ersk. b. 1. t. 7. § 33.

[o] Pothier, n. 29. Chitty, 19, 20. Ersk. b. 1. t. 7. § 33.

Person interdicted.

A person *interdicted* is not incapacitated from granting bills without consent of the interdictors, because interdiction affects the heritable estate only. Such bills, however, will not be valid grounds for attaching the heritable estate, unless the creditor prove that the sums were laid out profitably for the debtor. Ersk. b. 1. t. 7. § 57–8.

Aliens.

An *alien enemy* is not entitled, while war continues, to sue for

Liability of persons whose names not on bill.

It may be laid down as a general rule, that no person can become a party to a bill, unless his name be on some part of it. Bills being negotiable solely upon the credit of the names which appear upon them, recourse cannot lie against one who passes a bill, of which he is neither accepter, drawer, nor endorser, though it should be afterwards dishonoured; as it is to be presumed, that he who took or discounted the bill, did so on the credit and responsibility of the names already upon it.[p] Any person, however, may draw, accept, or endorse a bill by his agent, factor, or clerk, which is termed by *procuration*;[q] and as this office is merely ministerial, minors, married women, and persons incapable of contracting in their own right, so as to bind themselves, may nevertheless be agents for these purposes.[r]

Procuration.

To authorise a person to act by procuration, it is said that a written commission or power is necessary;[s] but it would appear, from the custom of merchants, that it is sufficient if the authority be verbal, or if the person drawing, accepting, or

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payment of a debt due him in this country. The debtor is therefore entitled to resist the payment of a bill of which an alien enemy is the holder, or which he has endorsed away after the declaration of war. Johnston & Wight *v.* Goldsmid & others, 15th Feb. 1809. Fac. Coll. But the right of action revives on the return of peace. Bell's Comm. I. 234. Bayley, 58.

[p] 1794, Harrisons *a.* Chippendale, Fac. Coll. No 141. p. 324. Mor. 1620. Kyd, p. 198. See ch. v. note [1].

[q] Beawes, n. 83.

[r] Manning's Law of Bills, p. 56. Chitty, 23.

[s] Beawes, n. 86. Mar. p. 104. Forbes, p. 15.

endorsing the bill *per procuration*, was in the habit of doing so, and his acting in that capacity recognised by the principal.[t]

Any one who, by procuration, negotiates, draws, accepts, or endorses bills, by subscribing his own name for his employer, effectually binds the principal, while he himself remains unbound. But if a person draw a bill in his own name, for behoof of another, without mentioning his character of factor, he is presumed to have interposed his credit for his constituent, and is personally liable.[u]

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[t] Bell's Comm. I. 311. In a case in which this point occurred, the Lord Chancellor said,—" Here a greater error has occurred than he ever remembered to have met with, if the commercial law was the same in Scotland as in England. In one of the interlocutors there is a finding, " that an endorsation *per* procuration requires a special mandate." His opinion was, that no such thing was absolutely necessary ; for if, from the general nature of the acts permitted to be done, the law would infer an authority, the law would say that such an authority might exist without a special mandate, and that an endorsation *per* procuration might be good, though there were no such mandate." Davidson *v.* Robertson and others, 3 Dow. 218, 4th July 1815. See also Chitty, 23. 25.

It has been decided in England, that if one usually subscribes an instrument with the name of another, proof of his having done so in many instances is sufficient to render liable the person whose name is subscribed, without production of any power of attorney. Neal *v.* Erving, 1 Esp. 61. Haughton *v.* Ewbank, 4 Camp. 188.

In the case of a person having the powers of a general agent or factor, the principal is bound by all his acts ; but an agent constituted for a particular purpose, and under limited and circumscribed powers, cannot bind the principal by any act exceeding his authority, Chitty, 23. Turnbull *v.* M'Kay, 26th Feb. 1822. Shaw's Rep. I. 353. Watson *v.* Bank of Scotland, 15th May 1806. Mor. App. to Mandate, No 3, (as reversed on appeal.)

The principal is liable to the endorsees of the bills drawn by his factor, for goods sold on his behoof, though his own name should not appear on them. Telfer *v.* James, Wood and James, 5th Feb. 1822. Shaw, I. 290.

[u] 1782, Connel *a.* MacLelland, Fac. Coll. No 141, p. 324.

It is said by Beawes, that the possessor of a bill must admit of the acceptance of a procura-

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Mor. 1485. The same is held in England, Chitty, 27. And it has been so decided even in questions between the agent and principal, Lefevre *v.* Lloyd, 5 Taunt. 749. Defendant as broker sold cotton for plaintiff, and drew, in his own name, on buyer for the amount in favour of seller. He was found liable for the bill. Goupy *v.* Harden, 7 Taunt. 159. An agent employed to buy bills on Portugal at 10s. per cent. commission, got them payable to his own order, and endorsed them, without restriction, to his employer. He was held liable for the amount.—Ed.

With regard to a factor's liability to the principal, in Scotland, it was found, that a factor taking bills in his own name from his constituent's debtor, and the debtor becoming bankrupt, the loss must be sustained by the factor. 1739, Ainslie *a.* Arbuthnot, Dict. 3. 202. Mor. 4065.

A factor in Scotland employed to sell goods belonging to English merchants, was accustomed to lodge the price in a private banking-house, on an account in his own name, and to take from them bills drawn on their correspondents in London, payable to himself, which he endorsed and transmitted to his employers, against whom he charged a commission of 2½ per cent. Upon the bankruptcy of the drawers and accepters, he was found liable for such bills as had not been paid by them. 1795, Baines *a.* Turnbull, Fac. Coll. No 187, p. 452, Mor. 1486. Chitty, 28.

A banker in Edinburgh having got orders to remit his correspondents money, by a bill on the Bank of England, chose rather to remit it by a bill upon a private banker in London. The bill was taken out of the post-office by some unknown person, who, upon a false endorsation and receipt, got the money from the banker on whom the bill was drawn. It was found that the remittance by bill, on a private banker, was at the defender's own risk and hazard. 1730, Selwyn *a.* Arbuthnot, Dict. 1. 58. Mor. 10,094.

A mercantile company in Scotland sold grain for a merchant in London on a *del credere* commission, and took bills for the price. These bills they discounted with a private banking-house in Edinburgh, then in good credit, from whom a bill drawn on London was taken for the amount, payable to the order of the Scotch company, who endorsed and transmitted it to their employer. The drawers and accepters of this bill having become bankrupt before the term of payment, the Scotch Company were found liable for it. 1795, Scott *a.* Mackenzie, &c. Fac. Coll. No 149, p. 341. Affirmed upon appeal, 1796, Dec. 19. Mor. 10,101.

A person having accepted a bill for a sum, as the price of a

tor properly empowered to accept; and that a procuration, either general or special, is sufficient for that purpose.[v] But an agent cannot delegate his authority, unless an express power be given him to that effect.[w]

Recall or expiry of procuration.

When a merchant wishes to withdraw his procuration from any agent or clerk, who has been in the habit of drawing or accepting bills in his name, he will naturally be careful to give early notification of it to his correspondents, as, otherwise, he may be brought in to pay bills which he never meant should be accepted or drawn by him; notice in the Gazette not being accounted sufficient intimation, unless it be brought home to the knowledge of the person insisting on the want of it.[x]

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part of a ship which he had commissioned the drawer of the bill to buy for him, payable to the drawer or order, upon his delivering a vendition to the accepter, was found bound, by his acceptance, although the ship was bought by the drawer in his own name, and though he had not offered the vendition till after the ship had been damaged: seeing that the constituent had never tendered the money, or demanded the vendition. 1711, Gibson and Wilson, *a.* Leith, Dict. 2, 58. Mor. 10087.—A.

[v] No 87, Scarlett's Style of Exchanges, ch. 23. R. 10. See post. ch. iv.

[w] Manning, p. 90. Chitty, p. 26.

[x] Chitty, p. 26. Limited mandates for doing a special act expire by performance of the act, or by death or revocation, and are not, like general powers, capable of extension by mere inference and *bona fides.* Bell's Comm. I. 396.

But where the procuratory or authority is general, its effect continues till its recall or expiry is generally known, or is brought home to the knowledge of those founding on it. Chitty, 26.

Death, bankruptcy, and insanity have in law the effect of revocations of delegated powers. But the *bona fide* transactions of persons in ignorance of these events are protected. Bell's Comm. I. 395-6. See Pollock *v.* Paterson, 10th Dec. 1811. Fac. Coll.

The representative of a person deceased may become a party to a bill, by filling up his own name as drawer, if the bill be found blank in the drawer's name in the repositories of the deceased.[y] Representative of drawer.

Corporations may become parties to bills, by their agents or office-bearers for the time being;[z] and the whole partners of a company may be bound by the subscription of the copartnery firm.[a] Corporations. Partners.

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[y] 1801, Fair *a.* Cranston, Session Papers. Mor. 1677.

[z] The managers for the time being of a corporation, as being in possession of its funds, may be charged by personal diligence for payment of the debts of the corporation; but they are entitled to a suspension of the diligence on making over to the creditors the funds under their management. Livy *v.* Mudie and others, 6th Aug. 1774, Mor. 2512. Anderson *v.* Morton and Alexander, 18th Nov. 1779, Mor. 2514.

[a] 1766, Dewar *a.* Miller. Fac. Coll. No 38. p. 63. Mor. 14,569. The whole partners are bound by bills granted in name of the copartnery by one of them, even though that partner was by their agreement expressly prohibited from granting or indorsing bills, unless that stipulation was known to the receiver. Bayley, 45.

If the stipulation was known, the receiver of the bill must prove that the value was applied for behoof of the company. Chitty, 31.

If a partner grant a bill in the company's name for a private debt of his own, or in the course of his own individual concerns, the receiver, knowing this, cannot recover the contents from the other partners, unless he prove their concurrence in, or approbation of this use of the firm. Blair Miller *v.* Douglas, 22d Jan. 1811, Fac. Coll. Chitty, 33. In *ex parte* Bonbonus, 8. Vesey, 542, Lord Chancellor Eldon said,—" This petition is presented here upon a principle which it is very difficult to maintain; that if a partner, for his own accommodation, pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that. I agree, if it is manifest to the persons advancing money that it is upon the separate account, and so that it is against good faith that he should pledge the partnership, then they should shew that he had authority to bind the partnership. But if it is in the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold, that a man borrowing money upon a bill of exchange, pledging the partnership, without any knowledge in the bankers that it is a separate

One of two copartners having accepted, "for his own half," a bill drawn on the company, it was found that he was liable for the whole sum, as he ought to have accepted simply.[b]

Joint-accepters and payees.

When a bill is addressed to, and accepted by, more persons than one, the whole accepters are bound, jointly and severally, to the holder, whether it be so expressed in the bill or not; and the holder may exact payment from any one of them.[c]

When a bill is payable to two persons, neither of them can indorse it for more than half the sum; and payment by the accepter to one or other of the holders will liberate him.[d]

If a bill be granted by one person as principal, and by others as cautioners, and indorsed by the holder to any of the cautioners, the principal is liable for the whole contents.[e]

Where a bill is payable to three persons, two of them may pursue for the whole sum.[f]

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transaction, merely because that money is all carried into the books of the individual, therefore the partnership should not be bound."

An innocent indorsee will not, however, be affected by these objections. Clark *v.* Shepherd, 28th Feb. 1823. Shaw's Rep. II. 255. Bayley, 47.

After due notification of the dissolution of copartnership, none of the partners will be bound for acts of the others in the name of the firm. Chitty, 35-6.

[b] 1712, Naughton *a.* Ritchie. Dict. v. 1. 98. Mor. 1490.

[c] 1761, Gordon *a.* Sutherland, Fac. Coll. No 7. p. 11, Mor. 14,677.

[d] 1685, Fountainhall, v. 1. p. 332. Harcarse, (Bills, &c.) No 163. p. 36. Mor. 14,674. Bayley, 43.

[e] 1742, Alexander and Hill *a.* Scott. Home, No 116, p. 328. Mor. 14,675. See post. p. 59–60.

[f] 1744, Lord Lyon, &c. *a.* Gordon. D. Falconer, v. 1. p. 26. Mor. 14,676.

If there be several drawers who subscribe the bill, all are liable in case of a protest.[g] Drawer.

If a factor of an incorporate company draws a bill on such company, and one member accepts it, the acceptance will not bind the company, because it is not a public act of the company, but a private act of the party.[h] And on the same principle, if several persons, each in his individual capacity, employ one factor, and he draws a bill on all of them, and one accepts it, the acceptance will not bind the rest.[i]

An authority given to one partner to receive debts owing to, and pay those due by, a copartnery concern on its dissolution, does not entitle him to draw a bill on one of the debtors of the partnership, and, on its being accepted, to indorse it in *name* of the company.[k]

The principal and immediate parties to a bill, are the drawer, accepter, and payee; but a person may indirectly become a party to it; as, where he accepts for the honour of the drawer, or any of the indorsers; which is called an acceptance *supra* protest.[l] Accepters *supra* protest.

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[g] Molloy, b. 2. c. 10. § 16.
[h] Ibid. § 19.
[i] Mar. p. 64. Beawes, pl. 228. Chitty, 38.
[k] Chitty, p. 38. Kyd, 33. See also 1788, Dalgliesh, &c. *a.* Sorley. Bell's Cases, p. 487.
[l] Poth. n. 25, 26. See ch. iv.

# CHAP. III.

## OF THE REQUISITES OF BILLS.

Bills having been originally introduced to save the trouble and risk attending the carriage and transmission of money, and sanctioned by law on account of their convenience in trade, obviously require, that money alone should be their object, and that they should not contain any extrinsic quality incompatible with their primary use and destination. Were it otherwise, they would soon come to interfere with and usurp the place of deeds, which demand more formal solemnities to give them validity and effect. The payment of money alone, therefore, is the proper and genuine province of bills of exchange; and they are to be considered as bags of money, payable from hand to hand, as a necessary medium of trade.

Bills must be for money only.

It has accordingly been early ascertained, that bills must be for the payment of cash only, and not for the performance of acts. Thus, bills, or precepts for the delivery of salt, meal, barley,

and other fungibles,[a] were found not to possess the privileges of bills of exchange;[b] nor is it even certain whether such bills will be sustained as probative writs.[c] It was however determined, that an obligation to deliver a fish-debenture, in payment of a quantity of salt, was indorsable as a bill; being a transaction betwixt merchants, *in re mercatoria*, and agreeable to practice;[d] and the indorsee of a debenture was preferred to a creditor of the indorser, who had, posterior to the indorsation, arrested in the hands of the commissioners of the customs.[e]

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[a] Whatever consists in quantity, and is estimated in weight, number, and measure, as grain, wine, &c. is a fungible,—articles *quæ functionem recipiunt.* In this sense, coin, or money, is no doubt a fungible; but the term is to be here taken as denoting other fungibles, such as those mentioned.—A.

[b] 1713, Leslie *a.* Robertson, Dict. v. 1. p. 95. 1715, Douglas *v.* Erskine. Dalrymple, No 139. p. 193. Mor. 1397. This is illustrated also by the following English cases:—Martin *v.* Chauntry, Str. 1271, in which action was refused on a note for delivery of horses, and a wharf, and payment of money at a particular day. It has even been held, that a promise to pay a sum of money in *good East India bonds,* or in *cash, or Bank of England notes,* was not a note within the statute, because these might be of less value than cash.—Anon. Buller's N. P. 272. *Ex parte* Imeson, 1815.

The sum in a bill or promissory-note must also be *definite.* In Smith *v.* Nightingale, 2 Stark. 375, action was refused on a note, by which defendant "promised to pay James Eastling, my head carter, L.65, with lawful interest for the same, three months after date, *with all other sums that may be due to him.*" Lord Ellenborough thought this no note even for L.65, but an agreement, and requiring a stamp as such. Bayley, 7, 8. Chitty, 42–6.

[c] 1729, Bruce *a.* Wark. Dict. v. 1. p. 95. Session papers in Advocates' Library. Mor. 1399.

[d] 1724, Hamilton *a.* Dalrymple. Edgar, Dec. p. 18. Mor. 1403.

[e] 1744, Hope *a.* Neilson. Dict. v. 3. p. 74. Mor. 1403. The transference of commodities by means of precepts or orders for delivery has been the subject of much discussion. But a

Payment must be certain.

On the same principle, that bills ought to be for the payment of money only, it is necessary that the obligation they bear to pay, should not be clogged with uncertain conditions and contingent events, which fall more particularly within the range of another class of contracts, differing from bills both in their origin and nature, and their form and constitution. The great advantage of bills flows from their rapid circulation, and facility of negotiation; but their circulation and negotiability would soon be stop-

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statement of the law with regard to them would be out of place here, because, though, to a certain extent, they are of the same nature as bills, being the mode of transferring to a purchaser commodities in the hands of a third party, as bills are of transferring debts, yet the rules of law applicable to each have little resemblance.

Whether such precepts are in the form of letters or bills, or in any other shape sufficiently indicating the meaning of the proprietor, there can be no doubt that they are probative, like other commercial documents, without any formal solemnities. They were sustained to this effect in all the Scots cases cited above.

To complete the purchaser's right under such an order, the order must be intimated to the custodier of the goods. This, provided they are in a deliverable state, is held to be *constructive delivery* of the goods, and puts them beyond the reach of stoppage *in transitu*, or any other claim on the part of the seller or his creditors. If any thing remained to be done before delivery, as weighing, measuring, or the like, the transference is not completed till that operation be performed. If the goods are in the hands of the seller himself, or of a person identified with him, as a servant, clerk, &c. a written title is of no avail, and *actual delivery* must take place.

There is an exception in two cases from the necessity of intimation or delivery,—the indorsation to a purchaser of a bill of lading of goods at sea, and of an order for delivery of goods bonded under 43d Geo. III. c. 132. The purchaser of the goods has, in these cases, the privilege of an indorsee to a bill of exchange, of not being liable, after the indorsation, to any claims by the indorser or his creditors.

See the law on this subject stated at length in Bell's Comm. I. 89-133. Brown on Sale, 452, *et seq.*

ped, if they were issued into the world encumbered with contingencies and extraneous clauses; and the utmost perplexity would be introduced into commercial transactions.

The payment of a bill ought to be certain; for, were it not payable at all events, it would want one of the most essential qualities of a bill, whatever might be its effect as a voucher of debt.[f] But if the event, on the occurrence of which it is to be paid, is not very distant, or such as will in all probability soon happen, so far a conditional bill will be sustained;[g] nor will it be affected by the payment being directed to be made out of a particular fund. Thus, a bill drawn by a major-general upon the paymaster of a regi-

Effect of mention of a particular fund.

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[f] Effect was given to this rule, and action accordingly dismissed, in the following English cases:—Kingston *v.* Long, B. R. M. 25th Geo. III., where an order was payable "*provided the terms of certain letters written by the drawer were complied with.*" Smith *v.* Boheme, 3 Lord Raym. 67. cit. Lord Raym. 1362, 1396, where the maker of a note promised to pay a sum on demand, *or surrender the body of Samuel Boheme in an action brought against him by plaintiff.* Beardsley *v.* Baldwin, Stra. 1151. Pearson *v.* Garrett. Comb. 277, and 4 Mod. 242, where notes payable *when defendant shall marry,* and *if plaintiff should be married within two months.* Chitty, 43, *et seq.* Bayley, 12, *et seq.* The only Scots case on this subject seems to be that noticed in Mor. 1410, Campbell *v.* Campbell, where the Court sustained the objection to a bill, that it was payable *in a certain event.* "It was observed on the bench, that the sexennial prescription could not be made applicable to cases where the term of payment depended on a contingent event. The Court have hesitated to support bills of which the term of payment was remote, as deviating from the proper nature of such documents; much more would they discountenance the present more distant deviation."

[g] This observation must be received with caution. See Notes [f] and [h]. If the bill or note be holograph of the accepter or maker, it will be good as a voucher of debt. Bell, I. 301. No 330. 1739, Inglis *v.* Wiseman's representatives. Mor. p. 1404.

ment, "ordering him to pay L.33 out of his clearings of the months of July, August, September, October, November, and December, in full of his and hautboys' dues from the said regiment, when received," and by the drawee "accepted when clearance comes to hand," was found effectual, and preferable to a posterior arrestment of the same fund, by a creditor of the drawer.[h] But an obligation to pay 10s. *per diem* to a person, until he should be provided with a

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[h] 1710, Macgibbon *a.* the Managers of the Woollen Manufactory at Newmills. Forbes, p. 422. Mor. 1400. In England the general rule is firmly established, that a bill payable out of a particular fund is invalid. Bayley, 15. Chitty, 43, and it was so decided in the following cases:—Haydock *v.* Linch, Lord Raym. 1563, where order on drawee to pay a sum *out of the fifth payment when it should become due*, and it should be allowed by drawer. Dawkes *v.* Lord Deloraine, Blackst. 782. 3 Wils. 207, where a draft was to be payable *as soon as the accepter received the amount.* Hill *v.* Halford and another, in error 2 Bos. and Pul. 413, where there was a promise to pay L.190, *on the sale or produce, immediately when sold, of the White-Hart Inn*, though it was averred a sale had taken place before the action was brought. These cases would probably be held to overrule the authority of that of M'Gibbon.

In the above cases, the fund out of which the bills were to be paid was not realized, and, by the terms of the bills, payment depended upon the contingency of the drawee receiving the fund. There is another class of cases which have received the same determination; but should similar cases occur in Scotland, it may be questioned whether a distinction ought not to be made. The following are examples;—Jenny *v.* Herle, Lord Raym. 1361. 8 Mod. 265. Str. 591. Herle sued Jenny upon a bill drawn by him upon Pratt to this effect.—"Sir, you are to pay Mr Herle L.1945 out of the money in your hands belonging to the proprietors of the Devonshire mines, being part of the consideration-money for the purchase of the manor of West Buckland." A judgment in Herle's favour in the Common Pleas was reversed in the King's Bench, because the bill was only payable out of a certain fund supposed to be in Pratt's hands. Banbury *v.* Lisset, Str. 1211, where a bill was drawn "on account of freight of the Galley Veale, and this order shall be your sufficient discharge for

company in the army, conceived in the form of a bill, was found null.[i] And it may be safely laid down in general, that bills made payable upon a contingency, or the happening of some distant event, are liable to challenge, both as being totally inconsistent with the proper nature of such documents, and because bills are now li-

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the same." Lee C. J. gave his opinion that the bill was invalid, as being payable out of a particular fund; and Bayley, 18, and Chitty 44, state this to be law, "because the quantum due for freight may be open to litigation."

In these cases, in which the particular fund was stated to be actually in the drawee's hands, it cannot be said that the payment of the bill depended upon the sufficiency of the fund. The drawee after acceptance could not, it is thought, have maintained, in a question with an onerous indorsee, that he was liable in payment, only provided he continued to hold the specified fund when the bill fell due. His acceptance was an acknowledgment of his being possessed of the fund, and he ought not to have subscribed, if he was unwilling to subject himself to the ordinary responsibility of an accepter. *Before* acceptance, no greater contingency, it is evident, attends such bills than attends all others, of being refused acceptance by the drawee for want of funds.

If, however, the order proceeds from the *freighter*, it is held good in England, because it is an admission that so much at least is due. Pierson *v.* Dunlop. Cowp. 571. It is also said, that if the particular fund is mentioned merely as a direction how the drawee is to reimburse himself, and the sum is payable *at all events*, the bill will be good. Chitty, 49. Under this exception, such cases as those of Jenny and Banbury ought, in the editor's opinion, to be included.

So also, if a bill is payable within a limited time after the payment of money due by government, it will be sustained, because it is morally certain that such payment will be made;—but it must appear that there is no doubt that the money will be received by the drawee. Bayley, 20. (note 45.)

In M'Dowall *v.* the Duke of Douglas, June 1731. Mor. 1541, where a bill payable out of a particular fund, when received, was founded on, the question did not relate to the validity of the bill, but to the point whether the bill was evidence of value having been given by the payee to the drawer.

[i] 1721, Viscount Garnock *a.* Duke of Queensberry. Dict. v. 1. p. 95. Mor. 1401. See Campbell *a.* Campbell. Bell's Cases, p. 111.

mited to a period of six years, with respect to the duration of their privileges; and if the time of payment was remote or contingent, the law of prescription could not be made applicable to them. Action was accordingly refused, on a bill made payable after the decease of the granter, who lived thirty-seven years thereafter.[k]

Effect of extraneous stipulations.

It will not vitiate a bill, that it stipulate what would equally follow though it were not expressed; and therefore a bill drawn for a balance at settling accounts, and expressing that it, when paid, with the drawer's receipt, should be a sufficient discharge of all claims on the drawee, was supported;[l] nor will the bill be vitiated by specifying the consideration for which it is drawn; as, "for my growing crops of corn and grass, in the town of Musselburgh, which are instantly sold to you at the aforesaid price."[m] But a bill containing a clause of substitution, as, "Pay to me or order, or, failing me by decease, to my second son, Alexander Waddell, the sum of," &c. was decided to be null, though a proof was

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[k] 1782, Stewart *v.* Fullarton, &c. Fac. Coll. No 25. p. 45. Mor. 1408. It is held in England, that if a bill is made payable at a day that must arrive, however remote, it is good. Thus, one payable six weeks after the death of the drawer's father, and another, payable to an infant when he should come of age, specifying the date, were sustained. Chitty, 48. It is doubtful whether such bills would be sustained in Scotland, at least whether they would be allowed the privileges of bills. Having been at first introduced for the convenience of mercantile transactions, it is necessary that they bear some resemblance to their originals in their term of payment.

[l] 1738, Trotter *a.* Sheil. Dict. v. 1. p. 95. Mor. 1402.

[m] 1722, Wilson *a.* Smith. Ibid. Chitty, 49.

allowed that the accepter had received value at the time he granted the bill.[n] Two parties having made reference of a lawsuit, they accepted bills to each other, which they deposited with the arbiter, to be given to the party who should be found in the right. These bills were found good, notwithstanding their conditional nature, inasmuch as they were to be considered as money, and, in this respect, not deviating from the proper nature of bills.[o] A bill too, addressed to one person as principal, and to another as cautioner, conjunctly and severally, and accepted by the latter, with the words "as cautioner" subjoined to his acceptance, was held to be valid, though

An accepter signing as cautioner.

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[n] 1739, Inglis *v.* Wiseman's representatives. C. Home, No 130. p. 218. Mor. 1404. In like manner, a note payable to J. P. Dahmer *or* plaintiffs, or his or their order, was held in England to be invalid. Blankenhagen *c.* Blundell. 2 Barn. & Ald. 417.

[o] 1751, Clerk *a.* Kerr. Dict. v. 3. p. 74. Mor. 1405. The period from which the contingency of a bill or note is to be judged of, is that of its being first issued or put into the hands of the payee. In the above case this period did not commence till the arbiter delivered the acceptance to the party entitled to it. He held the bills in the meantime as a trustee, and before delivery they were no more existing claims of debt than if the parties had kept them in their own possession. They could not therefore be considered as truly of a conditional nature. This case is in a different situation from Leeds *v.* Lancashire. 2 Camp. 205, where a promissory-note was granted by three persons for L.200, without a term of payment, and having a declaration on the back, that it was taken as a security for all balances due by one of the three to the payee, not exceeding L.200; and that it was to be in force for six months, and no money to be called for sooner. This writing evidently qualified the note from the first in the hands of the payee, and made the payment of it conditional, and the payee was accordingly nonsuited in an action brought upon it. See also Hartley *v.* Wilkinson and another, 4 M. and S. 25. 4 Campb. 127. S. C.

it was objected, that a cautionary obligation could not be constituted by a bill.[p]

What constitutes a promissory-note.

Any precise set of words is no more essential to the constitution of a promissory-note, than to that of a bill. It is sufficient if the note, in point of fact, amounts to a promise of payment; and, in other respects, the same rules will apply to them as to bills, viz. that they must be made payable at all events; and that they must be for the payment of money only, and not for the performance of acts, or delivery of fungibles.[q] The mere acknowledgment of a debt, without

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[p] 1753, Gibson *v.* Campbell. Fac. Coll. No 93. p. 141. Mor. 1406. Such an addition may be of use in a question between the cautioner and the joint-accepter; but it gives him none of the privileges of a cautioner in a question with the holder. Sharp *v.* Harvey and others, 24th June 1808. Mor. App. to Bill, No 22. Here an accepter, who had bound himself "*as security, jointly and severally,*" was found not entitled, in a question with the drawer, to the privileges of the act 1695, ch. 5, limiting the engagements of cautioners to seven years; and in Macdougall *v.* Foyer, 13th Feb. 1810. Fac. Coll., where the bill was not even addressed to him who signed as cautioner, he was found liable to the drawer, jointly and severally, with the other accepters. In the English case of Jackson *v.* Hudson. 2 Campb. 447, where a bill was drawn on and accepted by J. Irving, and under his acceptance the defendant wrote, "accepted, J. Hudson, payable at," &c., Lord Ellenborough held this not to be a proper acceptance, but a collateral undertaking that the bill should be paid, and that it ought to have been proceeded on as such. In M'Kellar *v.* Campbell, 7th June 1811. Fac. Coll., the Court held that two accepters bound "conjunctly," were each liable for the whole sum in the bill.

[q] "No particular words are necessary to make a bill or note; any order or promise which, from the time of making it, cannot be complied with, or performed, without the payment of money, is a bill or note.

"Thus, an order or promise to deliver, or that J. S. shall receive money, or to be accountable or responsible for it to him or order, is a good bill or note." Bayley, 4, 5.

some words from whence an engagement to pay can be inferred, cannot be constructed into a promissory-note, such as the common memorandum, I. O. U.[r]

Effect of a stipulation of interest.

Promissory-notes granted by bankers for money deposited, generally contain an obligation to pay interest at the understood rate of per centage. But it was long doubted, whether a clause of this nature would not vitiate a bill. And though there is little doubt that, in the present day, a bill stipulating the payment of interest would be supported, yet it is certainly more advisable to draw bills in the usual manner, for a principal sum merely, which bears interest by law after the day of payment; and any interest which may be due from the date can easily be included in the principal. The decisions concerning bills with clauses stipulating the payment of interest are extremely various and discordant; and it is somewhat curious to trace their history.

In the case of Henderson *a.* Sinclair, which occurred in 1727, it was found, that a bill bearing interest from the date was good.[s] The same was found in the case Dinwoodie *a.* Johnston, ten years afterwards;[t] and a similar decision was given in Gilhagie *a.* Orr.[u] Thereafter, the Court seems to have inclined to the opinion, that a

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[r] Bayley, 5.
[s] Dict. v. 1. p. 96. Mor. 1419.
[t] 1737, *Ibid.*
[u] 1738, *Ibid.* Mor. 1421.

clause of interest in bills was extrinsic, and inconsistent with their nature; and therefore, in the next question that appeared before them, the Lords sustained the objection to a bill, that it stipulated payment of annual rent seventeen days before the date. 1741, MacNeil *a.* Campbell. Dict. v. 3. p. 75. Mor. 1422. And, in the same year, a bill bearing annual rent from the date was decided to be null, notwithstanding the many former decisions in favour of such bills; and a resolution was taken by the Court, to find all such bills void thereafter.[v] In the very next case, however, which occurred for the determination of the Court, a bill conceived in the following terms:—" Nov. 11, 1741. Against Martinmas next, pay to me or my order, the sum of 250 merks, with the first year's interest, twelve merks and a half, value in your hands;" addressed to and accepted by " John Schaw in Glentore," was sustained.[w] The Court, however, was much divided on the point; and it was carried by the narrowest majority. It was argued, that the amount of the year's interest was specified in the body of the bill, and that this was nearly the same thing with what merchants were accustomed to do every day, who, when they take their bills payable in six months, add the six months interest to the principal, and make the bill pay-

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[v] 1741, Paterson *a.* Finlays. Kilker. No 5. p. 71. *voce* Bill of Exchange. Mor. 1422.

[w] 1743, Schaw *a.* Russel. Kilker. No 7. p. 71. Mor. 1423.

able for the whole, which bears interest after the day of payment; whereas here the principal sum *only* would bear interest after the term of payment. In conformity with the above judgment, the Lords decided the two next cases, Lauder and Husband *a.* Murray, 1744;[x] and Gordon *a.* the King's Advocate, 1756.[y] There immediately follows, however, a track of decisions of an opposite nature; and, in Lockhart *a.* Mirrie, 1750,[z] Moncrief *a.* Moncrief, 1751,[a] and Douglas and Lindsay *a.* Brown, 1757,[b] it was unequivocally found, that bills containing a clause of interest were null. In the last decisions that appear, it would seem that the Court has reverted to what was first laid down as the law on the subject; and a bill[c] bearing annual

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[x] Home, No 264, p. 423. Mor. 1424.

[y] Dict. v. 3. p. 75. Mor. 1426.

[z] Falconer, v. 2. No 170. p. 203. Mor. 1427.

[a] *Ibid.* No 228. p. 277. Mor. 1428.

[b] Kames, Sel. Dec. No 136. p. 192. Mor. 1429-31. In reporting this case, Lord Kames makes the following remarks:—"It was urged, that this bill was taken in 1725, when, by the decisions of the Court, it was published to the nation, that bills with interest from their date were legal securities; and therefore, to cut down this bill, is showing a sovereign contempt for the decisions of the Court of Session, as not in the least degree to be trusted to or regarded. I proposed, therefore, that the bill should be sustained upon this particular medium, of being granted by the authority of the Court, and that an act of sederunt should be made against such bills in time coming. The interlocutor, notwithstanding, was adhered to;—a lasting reproach upon the judges who voted for it, as being insensible or blind to the grossest act of injustice, viz. the forfeiting a man for doing what was declared at the time lawful by the sovereign court of the kingdom."

[c] 1760, MacLauchlan *a.* MacLauchlan. Fac. Coll. No 206. p. 369. Mor. 1432.

rent, where the debt was acknowledged by the accepter, and one containing a stipulation for interest from the date, such as is inserted in bankers' promissory-notes, were both sustained.

Penalty.

But whatever difference of opinion may have been entertained with regard to bills with clauses of interest, those containing a penalty have been pretty uniformly rejected.[e] A bill is effectual, though bearing "with penalty conform to law;" because, by law, there is no penalty due, and the words are therefore superfluous.[f]

Sum in bill.

The sum for which a bill is drawn is generally placed at the top in figures, and afterwards written at length in the body of the bill, the better to prevent alteration.[g] It is not absolutely necessary that the sum be first expressed in figures, though always advisable; and when the sum in figures is different from that in the body of the bill, the latter is to be taken, *prima facie*, to be the sum payable; as, independent of a

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[d] 1790, Sword *a.* Blair. *Ibid.* No 141. p. 280. It is observed, in reporting this case, that there is authority for stating, that what chiefly weighed with the majority of their Lordships, was the general understanding and practice of merchants regarding stipulations of interest in bills, as in bankers' notes and East India bills, which indicated that such of the later decisions as had set aside bills bearing a clause of interest were erroneous, and ought not to be followed as precedents. See App. p. 50. Mor. 1433.

Mr Bell, Comm. I. 301. Note [4]. accordingly states it as law, that a clause of interest does not vitiate a bill.

[e] 1727, Innes *a.* Flockhart. 1743, Drummond *a.* Grahame. Kames, R. D. v. 2. No 46. p. 74. Mor. 1418. and 1424.

[f] 1741, Dict. v. 3. p. 75; and 1760, Fac. Coll. No 206. p. 280. Mor. 1422.

[g] Poth. n. 35. 99.

man's being more apt to commit a mistake in figures than in words, the words are the essential part of the bill,[h] Care should be taken, that no blanks be left, either at the top, where the figures are placed, or where the sum is written in the body of the bill, lest the original sum be augmented; and the safest method is to write over the stamp. For, when a bill already accepted and indorsed, is fraudulently altered from a smaller to a larger sum, in consequence of blanks being left in it, and is afterwards discounted, all the persons whose names are upon it are liable for the full sum which the discounter *bona fide* paid.[i] And in the case of Grahame *a.* Gillespie & Co. 1795, June 25th, where blanks had been left in a bill at the time of accepting, by means of which the drawer was afterwards enabled to increase the sum from from L.58, 10s. to L.458, 10s., without giving the bill a suspicious appearance, it was found, that the accepter was liable for the increased value to the indorsee who had discounted the bill.[k]

Effect of fraudulent alteration of sum.

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[h] Beawes, n. 193. Mar. 138 and 139.

[i] 1793, Pagan & Hunter *a.* Wylie. Fac. Coll. No 62. p. 136. Mor. 1660.

[k] Fac. Coll. No 152. p. 345. Mor. 1453. But if the alteration is so clumsily executed, that it is apparent upon inspection, the parties will not be liable for the increased sum. In the above case, accordingly, the holder was on this ground found not entitled to recover on another bill for L.50, which had been altered to L.450. And it was farther held, that he was not entitled, under the bill, to recover even the original L.50.

If a person signs a blank bill-stamp, he will, in like manner, be liable to an onerous indorsee, in whatever sum may be filled up, coverable by the stamp. Bell, Comm. I. 303. No 333.

Stamp.

It should also be attended to, that the bill be written on a proper stamp; for, if the stamp be inferior in value to what is required by the act, the instrument will be annulled; though it would appear, that if it be written on a stamp exceeding the appropriate stamp in value, it will be sustained.[1]

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[1] 1804, June 31. Bowack, Fac. Coll. No 168. p. 381. Mor. App. to Bill, No 16. In this case, the bill, instead of being written on a stamp denoting a duty of 2s., was written on one denoting a duty of 3s. The Court considered the enactment of the stamp-laws to be solely for the purpose of raising a revenue, and that there was no view of introducing new solemnities in the execution of writings; and therefore, provided the revenue be not injured, a stamp may be used of any value the granter chooses. In an English case quoted, where a bill had been declared void as being written on a wrong stamp, though of superior value, it was observed, that the stamp used was a *receipt-stamp*, the duties on which might be differently appropriated. See Termly Reports, 22d June 1782, Taylor.—A.

The different stamp-acts are 22d Geo. III. c. 33, 23d Geo. III. c. 49, and 24th Geo. III. c. 7; 31st Geo. III. c. 25, 34th Geo. III. c. 32, 37th Geo. III. c. 90, 43d Geo. III. c. 127, 44th Geo. III. c. 98, 48th Geo. III. c. 149, 55th Geo. III. c. 184.

A bill, or note, on unstamped paper, or on too low a stamp, is null, and the defect cannot be supplied by after-stamping, 31st Geo. III. c. 25, § 19, and 55th Geo. III. c. 184, § 8; and the person making, signing, or issuing such bill or note, or causing it to be made, signed, or issued, or accepting or paying it, or causing or permitting it to be accepted or paid, shall besides forfeit the sum of L.50.

No neglect of negotiation by the holder of a bill or note, defective in the stamp, which has been indorsed to him in payment of a prior debt, will free the indorser from a claim for such debt, though the bill or note, but for such neglect, would have been paid. Wilson *v.* Visar, 4 Taunt. 228. Chitty, 58.

A bill, or note, is valid, though upon a *bill-stamp* of *greater* value than what is required by law, 43d Geo. III. c. 127, § 6. Under the former acts, such a bill had been held null in England, Farr *v.* Trice, 1 East 55. In Scotland it was sustained. See case of Bowack, *supra.* If a stamp be used of an equal or greater value than what is necessary, but of a *different deno-*

As the time when a bill becomes due can only be ascertained from the date, it is necessary, in all cases, that bills be dated. In England, a date, Date.

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*mination*, unless specially appropriated to another instrument by having its name marked on the face, the bill or note is valid, 55th Geo. III. c. 184, § 10. If so appropriated, it is thought that the proper stamp could be affixed on payment of a penalty of 40s. before the day of payment, and L.10 after it, in virtue of 37th Geo. III. c. 136, § 5-6, incorporated with 48th Geo. III. c. 149. § 3. 8.

A bill, or note, bearing interest *from the date*, requires the stamp corresponding to the amount of the *principal sum* only. Israel *v.* Benjamin, 3 Camp. 40. Pruessing *v.* Ing. Hil. T. 1821. K. B. & 4 B. & A. 204.

Promissory-notes for the payment of money to the bearer on demand, made or purporting to be made out of Great Britain, or purporting to be made by or on the behalf of any person resident out of Great Britain, (excepting notes made and payable in Ireland,) cannot be negotiated, circulated, or offered or received in payment, or offered or received payment of here, unless written upon the corresponding British stamp, under a penalty of L.20, by 55th Geo. III. c. 184, § 29. Foreign bills made abroad do not require British stamps; but when made in any part of the king's foreign dominions, they must have the stamp required by the law of the country. Clegg *v.* Levy, 3 Camp. 166. Alves *v.* Hodgson, 7 Term. rep. 241. The revenue-laws of foreign independent states are not regarded, Chitty, 57, and the cases there cited. A bill drawn out and accepted in Britain, and sent abroad for the signature of the drawer, is to be considered foreign, as it cannot be said to be drawn till signed by the drawer. Boehm *v.* Campbell, Gow. 56.

It is to be particularly observed, that a bill, or note, on which any material alteration has been made after being issued or accepted, is null under the stamp-laws, this being considered an attempt to make one stamp answer the purpose of two, unless the alteration is merely to correct a mistake, and in furtherance of the original meaning of the parties. A change on the date, sum, or term of payment, or stating a particular value instead of value generally, has been held a material alteration in this sense. Bayley, 89-91. This is a distinct ground of objection from that of the alteration not having been consented to. Bell's Comm. I. 302.

See on the subject of the stamp-laws applicable to bills, Bayley, 60-88. Chitty, 52-58. The clauses of the late act relative to this subject, and the schedule of duties, will be found in the App.

it is said,[m] is not in general essential to the validity of a bill; and when there is no date, the time, if necessary to be inquired into, is computed from the day it is issued. In France, the want of a date, or an error in the date, or the omission of the place where the bill has been drawn, cannot be objected by the drawer who has written, or the drawee who has accepted, the bill.[n] In Scotland, the date is an indispensable requisite; and bills without a date are null, if they have not all the solemnities required to other obligations.[o] The date ought in no case to be erazed or altered; and action was refused on a bill where the date appeared *ex facie* to have been altered, though it did not appear by whom, or for what purpose, the alteration had been made.[p] But where an alteration appeared to have been made at the time of writing the bill, to correct a blunder, such as writing 1780 for 1800, the document was held as actionable.[q]

Time of payment.

If a time of payment be not specified, the bill

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[m] Chitty, p. 59. 100.

[n] Pothier, n. 36.

[o] Ersk. b. 3. t. 2. § 26. Fac. Coll. v. 2. No 57. Mor. 1429. But a date is not necessary to bills payable at a certain specified term, or so many days after sight; but in the latter case the date of acceptance must be mentioned.

It is held in England, that there is no legal objection to a bill being dated on a Sunday. Drury *v.* De Fontaine. 1 Taunt. 131.

[p] 1796, Murchie *a.* Macfarlane. Fac. Coll. No 228. p. 530. Mor. p. 1458.

[q] 1802, Henderson *v.* Hay, *Ibid.* No 23. p. 46. Mor. 17,059. See as to alterations and vitiations of a bill, p. 65, and end of this chapter.

is to be held as a simple mandate to him to whom it is addressed, to pay a certain sum to the holder, who may be entitled to an ordinary action against the drawee, but not to diligence upon it as a bill.[r]

Bills payable to "order" and "bearer."

By the usual style and tenor of a bill, it is made payable to such a one, "or order;" but these words are not essential to its constitution; and bills are indorsable and negotiable, whether they bear "to order," or not.[s] The person, however, to whom payment is to be made, should always be named. If the drawer has omitted to mention any person to whom the bill is to be paid, but has declared of whom he has received value, the equitable construction is, that payment is to be made to that person.[t] Bills payable to the bearer are good in England, and are transferable by delivery.[u] Bills of this description were prohibited in France, on account of the fraudulent practices which they were supposed to engender; but, by a subsequent law, they were re-established.[v] It was also usual in that country, to make bills payable to a person whose name was left blank, in order that the

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[r] Poth. ch. 2, § 2, n. 32.

[s] 1726, Crichton *a.* Gibson. Dict. v. 1. p. 96. Mor. 1446. Bell's Comm. I. 312, No 346. In England, unless a bill is payable to "order" or "bearer," or other equivalent words are used, it is not indorsable to the effect of giving a claim against any one but the indorser. Chitty, 109.

[t] Poth. n. 31.

[u] Bayley, p. 25. Chitty, 64.

[v] Poth. n. 224.

holder might fill it up when he chose, either with the name of that person, or of any other. As these bills, however, were employed for the purposes of fraud and usury, they were afterwards abolished.[w]

In Scotland it was very customary, about a century and a half ago, for persons to execute bonds without filling up the name of the creditor, which got the name of blank-bonds, and passed from hand to hand like notes payable to the bearer. These bonds were considered to be of the same pernicious effect as blank-bills in France, as affording great room for fraudulent devices; because they excluded the debtor from pleading compensation or set-off against the bearer, upon debts due to him by the person to whom the bond had been originally delivered; and because, though the possessor of a blank-bond was known, yet, as it was always in his power to transfer it to another, merely by delivery, his creditors could not by any diligence secure the sum it contained for their payment. All deeds therefore, in which the creditor's name is left blank, are declared null by 25. Parl. 1696.[x] From this statute, however, indorsations

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[w] Sav. Parf. Neg. t. 1. liv. 3, c. 7. Ces billets ont été trouvé d'une si dangereuse consequence par les inconveniens qui en sont arrivé, particulierement dans les banqueroutes qu'ils ont été defendu par plusieurs arrets de sorte, que l'on en voit très peu à present.

[x] It is enacted, "That for hereafter, no bonds, assignations, dispositions, or other deeds, be subscribed blank in the person or persons' names in whose favour they are conceived; and that the

of bills and the notes of trading companies, are excepted.

Bills wanting drawer's name.

Upon the principle of this act, it has deen decided, that bills payable to the bearer are null as blank-writs.[y] The subscription of the drawer, too, was long held to be a necessary requisite; and there are a multitude of decisions, finding, that bills wanting the drawer's subscription, were writs blank in the creditor's name, and therefore null by the act; which, though it excepted indorsations of bills, did not except bills themselves.[z] Of late, however, another doctrine has been sanctioned by the Court. In 1785, a bill drawn in these terms,—" Against Martinmas next, pay to Ann Drummond, or order, the sum of 1035 merks, for value," was sustained,

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foresaid person or persons be either insert before or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before the delivery; certifying, that all writs otherwise subscribed and delivered blank, as said is, shall be declared null."

[y] 1730, Walkinshaw's Executors *a.* Campbell. Dict. v. 1. p. 104. Mor. p. 1684. Banker's notes payable to the bearer, are, as above-mentioned, excepted from the act, and pass from hand to hand by mere delivery.—A.

There is no recent authority in Scotland on the subject of bills payable to the bearer, and as Walkinshaw's case occurred at a time, when even bills blank in the drawer's name were held to be null as blank-writs, the point cannot be considered to have been set at rest by that decision. Checks on bankers are instances of bills payable to the bearer, which are undoubtedly valid. Sup. p. 37. note [e]. See Bell's Comm. I. 304, quoted post. p. 73. Forbes, 50.

[z] 1711, Brand *a.* Anderson, &c. Fountainhall, v. 2. p. 636. Mor. 1679.—1734, Neilson *a.* Russel. Mor. 1435.—1738, MacRaith *a.* Murdoch. Dict. v. 1. p. 96. Mor. 1436.—1748, Douglas, &c. *a.* Logan. Falconer, v. 2. p. 5. Mor. 1438.—1749, Bonnar *a.* Grant. *Ibid.* p. 56. Mor. 1441.—1777, Robertson, &c. *a.* Bissets. Mor. p. 1676.

though wanting the subscription of the drawer, whose name was mentioned in the body of the bill.[a] An objection to an accepted bill, that it was not signed by the drawer, was likewise repelled in the case of Hare *a.* Geddes, &c.;[b] the Court considering the objection to be obviated, by the circumstance of the creditor's name being both mentioned *in gremio* of the bill, and indorsed on it. In Fair *a.* Cranstoun, 1801, it was determined, that the representative of a person deceased was entitled to insert his own name as drawer of a bill found blank in the drawer's name in the repositories of the deceased.[c] And, in 1804, a bill drawn in these terms,—" L.425. Dundee, 28th January 1802. Three months after date, pay to me or my order, four hundred and twenty-five pounds sterling, at the Town-clerk's Office here, being for value delivered you,"—addressed to W. H. Moss, and accepted by him, was found actionable, though wanting the drawer's name, he having become bankrupt, and left the country without subscribing the bill.[d]

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[a] Drummond *a.* Creditors of Drummond. Dict. v. 3. p. 76. Mor. 1445.

[b] 1786, *Ibid.* Mor. 1446.

[c] Session papers, Advocates' Library. Mor. 1677.

[d] Ogilvie *a.* Moss, Fac. Coll. No 169, p. 382. Mor. App. to Bill, No 16. Though bills without the drawer's subscription are good as documents of debt, they are not entitled to the privilege of summary diligence. 1750, A. *a.* B. Kilker. (B. of Exch.) No 24, p. 88. Mor. 1442.—A.

In M'Donald's trustees *v.* Ranken, 13th June 1817, Fac. Coll. the Court considered the point so clearly fixed, that the want of the drawer's name did not affect the validity of a bill, that they

The safest method, however, is, for the drawer in all cases immediately to subscribe the bill that he draws, which will preclude the possibility of future challenge. In foreign bills, the drawer's subscription is utterly indispensable; for, without it, no recourse could lie against him; and, in fact, without the name of the drawer, it would be no bill at all.

Long prior to the decision in Ogilvie *a.* Moss, it had been established, that the drawer of a bill is entitled to sign it at any time before producing it in judgment,[e] even after the death of both the accepter and payee;[f] that a bill, though blank in the drawer's name at the time of delivery, is effectual if the name be filled up before the money is actually advanced;[g] and that the onerous indorsee of a bill is not affected by the circumstance of a person who had no title to it having filled up his own name as drawer.[h]

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would not order an answer to a petition, lest it might be conceived they considered the point as unsettled. Mr Bell lays down the law to the same purpose, Comm. I. 304, No 334: "Bills blank in the drawer's or payee's name were formerly held to fall under the act relative to blank-writs, 1696, c. 25. But the view now taken appears to be, that this statute does not apply to the case of bills, and that the acceptance is an undertaking to pay to the person who shall have right to the document, like a note payable to bearer."

In England, if a bill or promissory-note is issued with a blank for the payee's name, any *bona-fide* holder may insert his own name as payee. Cruchly *v.* Clarance, 2 Maule, 90. Id. *v.* Mann, 5 Taunt. 529. Bayley, 30.

[e] 1758, Ferguson *a.* Blair. Dict. v. 3. p. 76. Mor. 1443.

[f] 1748, Cathcart *a.* Henderson. *Ibid.* Mor. 1439.

[g] 1738, Henderson *a.* Davidson. Kilker. No 2. p. 69. Mor. 1435.

[h] 1748, Turnbull *a.* Tudhope. Falcon. v. 1. No 261. p. 353. Mor. 1437.

Do bills require solemnities?

To guard against falsification and forgeries, all deeds and writs for any sum exceeding L.100 Scots, not holograph of the granter, that is, not written with his own hand, are required, by the law of Scotland, to be signed before two witnesses, who must subscribe as such, and whose names and designations,[i] with the name and designation of the writer, must be inserted in the deed; and when a party cannot write, two notaries must subscribe for him before four witnesses.[k] When a deed is executed according to these statutory forms, it is held to be legal and probative, without any aid from the testimony of the instrumentary witnesses. In bills, however, it is not necessary either that the writer be named and designed, or that there be witnesses to the subscription. Among drovers and other illiterate people, instances have occurred where bills were signed with the initials of a name, or with a mark; and, in some of the earlier decisions, it would appear that bills of this description have been sustained.[l] But it is very questionable, whether a bill, in the present day, signed with a mark, would be considered as valid.[m] In bonds and other deeds, subscription

Bills signed by a mark, or initials.

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[i] The designation of a person is a specification of his employment or business, and where it is carried on, if he be in business, or the place of his residence if he be not.—A.

[k] Acts, 1579, c. 80, & 1681, c. 5.

[l] 1662, Brown *a.* Johnston. Mor. 16,802. Stair, b. 1. t. 11. § 7.—1729, Thomson *a.* Sheil. Dict. v. 2. p. 534. Mor. 16,810.

[m] 1735, Pringle *a.* Keil. Dict. v. 2. p. 533. *Ibid.* The Court, in Cockburn *a.* Gibson, 8th Dec. 1815, Fac. Coll., sus-

by initials is good, provided the person so subscribing prove the subscription, and that it is his ordinary method to subscribe in that way. As a document of debt, a bill may no doubt be supported upon a similar proof;[n] but it evidently could never be the foundation of summary diligence; and it might be dangerous to sanction the practice of accepting or indorsing bills by marks or initials. In the case, Dinwoodie *a.* Johnston, 1737, a bill signed by a notary before two witnesses, was sustained.[o] But in 1765, action was refused on a bill subscribed by two notaries without witnesses, though the Court seemed to be of opinion, that if witnesses had attested the subscription, the bill would have been effectual.[p]

Bills signed by notaries.

By the French Ordonnance du Commerce of 1673, bills of exchange are there required to express of whom value was received, as well as the nature of the value, whether money, merchan-

Value.

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tained a bill subscribed by a mark, where there were also two subscribing witnesses, as evidence in an ordinary action. In Stewarts *v.* Russell, 11th July 1815, Fac. Coll., action was refused, there being no evidence of the genuineness of the mark. And in Kennedy *a.* Watson, 25th May 1816, Fac. Coll., where a bill for L.5 bore to be accepted by the mark of a woman who was since dead, but without subscribing witnesses, the Court allowed the depositions of two persons, alleged to have been present, to be taken.

[n] 1760, Shepperd *a.* Innes, Dict. v. 4. p. 406. Mor. 589 & 16,818.—1785, MacIlwraith *a.* Mackmiken, *Ibid.* Mor. 16,820. But where the party cannot write, initials will receive no more credit than a mark.

[o] C. Home, No 61. p. 106. Mor. 1419.

[p] Buchanan *a.* Duncan, Fac. Coll. No 20, p. 33. Mor. 16,985.

Value. dize, or other effects, under the pain of nullity.[q] A bill, however, drawn without any of these requisites, though it loses its privileges, is good as a voucher of debt.[r]

In this country, it is not essential to a bill, that it expresses to be granted for *value received*, as value is presumed to have been given, whether the bill bear for value or not; unless it be proved by the writ or oath of the holder that he gave no value.[s] And this presumption was sustained in favour of the possessor of an order, bearing "to deliver to him a certain sum, and take his receipt;" seeing that "pay" and "deliver" are words promiscuously used, and import a debt due to him, to whom payment or delivery is to be made.[t] But where a bill for L.20 was drawn by a debtor in favour of a creditor, to whom he owed a larger sum, not bearing "value received from him," it was presumed to have been given in payment *pro tanto* of the prior existing debt, and not for present value advanced by the creditor.[u] An order of the following tenor,—"Pay to Captain Thomas Agnew, or order, the sum of L.111 sterling, out of the first subsistence you receive for me, which shall become due eight months after date," sub-

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[q] Tit. 5, artic. 28.

[r] Sav. Tome 1. liv. 3, c. 7.

[s] 1707, Scot *a.* Laing, Mor. 1535.—Ker *a.* Brown, Dict. v. 1. p. 99. Mor. 1539.—1715, Auchinleck *a.* Millar, *Ibid.* Mor. 1537.

[t] 1709, Swynton *a.* Tom, *Ibid.* p. 99. Mor. 1536.

[u] 1712, Cheap *a.* Arnot, Dict. v. 1. p. 100. Mor. 1537.

scribed "Forfar," accepted by Captain Wardlaw," was presumed given for value.[v] The indorsee of a bill is always presumed to have given value for it; and this presumption cannot be taken off but by a contrary proof.[w] Nor will a false description in the body of the bill, of the value given for it, render it void. The presumption of law, that the accepter has got value, can only be done away by the oath or writ of the party. It does not signify whether the value is given when the bill is drawn, or only afterwards, when it is discounted. In accommodation-bills, the value is seldom given till the latter period; and the circumstance, of a false description of the value, will not annul the bill, provided value of any sort is either actually received, or in law is presumed to have been received.[x]

Value.

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[v] 1731, MacDowall *a.* Duke of Douglas, *Ibid.* p. 99. Mor. 1541.

[w] 1715, Auchinleck *a.* Millar, *Ibid.* Bruce, No 67, p. 81. Mor. 1537.

[x] 1793, Wallaces *a.* Barrie, Fac. Coll. No 79, p. 174. Mor. 1484. As want of value, as well as several other important pleas, competent to the debtors in a bill or promissory-note, are usually allowed to be proved only by the writ or oath of the holder, it is proper to state here the general nature of an oath of reference.

A reference to oath is held to be of the nature of a judicial contract, by which the parties agree to hold the deposition, if consistent and explicit, as conclusive evidence upon the point referred. Stair, iv. 44. 6. Erskine, iv. 2. 8. Hence, the party referring has no remedy, if the result be unfavourable. But redress has been given in an indirect manner, when perjury has afterwards been proved, by the Court of Justiciary awarding damages to the extent of the debt, and expences. Case of Sommervill, 16th Feb. 1818, not reported.

It is not enough for a party in his oath to give merely a ge-

Value. An equivalent debenture, bearing to be transferable by indorsement, had passed through se-

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neral answer, negative or affirmative, of the point referred. (Swan *v.* Swan, post. See list of cases.) He must state the particulars of the transactions regarding which the question occurs. It is thus of importance, in the construction of the oath, to distinguish what circumstances are to be considered *intrinsic*, or pertinent to the point in dispute; and what are to be considered *extrinsic*, or unconnected with it. The general rule is, that every statement which resolves into a denial or admission of the point referred, and every matter which appears to have been part of the original transaction, and to have been in the contemplation of the parties at the time, are intrinsic, and proved by the oath. It follows, that if the holder state the actual delivery of value as the origin of the bill, or that it was granted for the balance arising on a settlement of accounts between the parties, or was the result of any other transactions on which the other party acknowledged himself to be debtor in the amount contained in the bill, the plea of no value will be rejected. At the same time, the holder must produce or give a reasonable account of any writings or vouchers which appear to have existed in the course of the transactions he details, that would have the effect of corroborating his statements, otherwise the credibility of them may be affected. On the other hand, if the value he condescends on arise out of transactions not in the view of the parties at making the bill, but out of separate dealings which, in the drawer's opinion, merely create a debt in his favour to its amount, he must prove these in the usual manner, and till he do so, he will not be allowed to recover under the bill.

A reference to oath may be made even after another mode of proof has been tried, and has failed. Law *v.* Lundin & Lumsden, 1747, June 24. Mor. 12,158. If the party to whose oath reference is made, do not attend at the time and place appointed, he will be held as confessed; and though he may, upon any plausible excuse, provided he apply recently, be restored against this certification, and yet, if a long delay take place, most satisfactory grounds must be shown for his neglect; and if he should die in the meantime, the presumptive confession will take effect. Ersk. iv. 2. 17. Wright, Feb. 1686, Mor. 12,036. Gilmour, 20th June 1797, Mor. 12,042. The reference may be retracted at any time before the oath is taken, on paying expences, unless it is evidently for the purpose of delay. Chalmers *v.* Jackson, 18th Feb. 1813, Fac. Coll. In Mainwairing *v.* Baxter, 4th Feb. 1812, Fac. Coll., where a reference was made to the oath of a person in a foreign country at war with Britain, the Court, before

veral hands by simple indorsation, not expressing "for value." An action having been raised against the last indorsee, on the ground that he held the debenture without value, it was found that the indorsation presumed value, as in a bill of exchange.[y] Value.

The value, or consideration, for which a bill is granted, must be lawful, otherwise the bill is void. Thus, bills of an usurious nature, or given in payment of a game-debt, or for contraband goods, will be set aside.[z]

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receiving it, ordained consignment of the sum in dispute to be made.

The Court have, of late years, become more strict than formerly with regard to the proof of non-onerosity, or *mala fides*, against the holder of a bill, and usually admit no other evidence than his writ or oath. See the cases quoted in ch. v. as to the proof of these objections against an *indorsee*.

[y] 1760, Castlehill *a.* Watson, Dict. v. 3. p. 77. Mor. 1475.

[z] The statute regulating the law against usury is 12. Queen Anne, c. 16, which enacts, "that no person or persons whatsoever, upon any contract, take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of L.5 for the forbearance of L.100 for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, made for payment of any principal, or money to be lent, or covenanted to be performed upon or for any usury, *whereupon* or *whereby* there shall be reserved or taken above the rate of L.5 in the hundred as aforesaid, shall be utterly void." The receivers of usurious interest are, by the same act, subjected to a penalty of treble the value of the money or commodities lent.

The *nullity* applies, when at or previous to the date of the bill or other security, the usurious interest is paid or stipulated for. It makes no difference whether the usury be stipulated in the document, or in a separate agreement; or whether directly, or in a covert manner, for instance, by increasing the principal sum. Meal *v.* Thom, 27th Nov. 1810, Fac. Coll. Bell's Comm. I. 237. Chitty, 76. But if the usury be stipulated in a separate agreement, subsequent to the date of the original document, the subsequent usurious agreement only will be null, Bell's Comm.

When value usurious.

Colhoun, at the term of Martinmas 1774, granted to Dun a bond for L.1000, payable at the succeeding Martinmas, with the legal interest for that year, and until payment.

Some years after, when the parties came to settle accounts, Dun stated interest separately for each half-year, upon which different sums he again reckoned interest; and he obtained from Colhoun a bill for L.473, partly composed of those accumulations of annual rent.

An action having been brought for payment both of the bond and bill, it was found, that no action could lie on the bill, in respect the same was in part made up of undue exactions, and that the pursuer's claim must be restricted to the principal sum contained in the bond, and annual rent thereof.[a]

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ib. A bill, of which any part of the consideration is usurious, or which is discounted or indorsed usuriously, is null to the parties concerned in the usury. Chitty, 77. As to the responsibility of an innocent indorsee for previous usury in the bill, see ch. v.

*Penalties* must, in virtue of 31 Eliz. c. 5, (which is held to apply to Scotland,) be pursued for within twelve months; and in order to ground an action for them, usury must have been actually *taken*. If a bill, objectionable on the ground of usury, be paid, no action will lie for repetition, but the penalties may be sued for. Nisbet *v.* Cullen, 1st Feb. 1811, Fac. Coll. Roberts *v.* Goff, 4 B. & A. 92.

[a] 1790, Dun *a.* Colhoun, Fac. Coll. No 114. p. 215. Mor. 16,436. Though it is not lawful, in the ordinary case, to accumulate interest on interest upon the settlement of a debt, yet bankers may lawfully do so, where there has been a stipulation to that effect, or a practice of making rests in their accounts at particular periods. An accumulation of principal and interest every quarter was not considered usurious in the English case of Caliot *v.* Walker, 2 Anst. Rep. 495.

It is usurious, in discounting a bill, to give goods at an extravagant price, instead of money, Davis *v.* Hardacre, 2 Camp. 375.

It is scarcely necessary to mention, that a banker, in discounting bills, is entitled to take, besides the legal interest or discount, a commission, agreeable to usage, on the amount of the bill.[b]

Commission for discounting.

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The proof of the fairness of the transaction is held to lie on the creditor, unless it appear that the debtor took the goods of his own accord in preference, Coombe *v.* Miles, 2 Camp. 553.

Goods were sold to a young man who was in want of money, at L.2224, for which a promissory-note was given; and the goods were resold for about half the original price. An action being brought to have the note delivered up, on payment of what the goods really produced on the sale, the Lord Chancellor held it a method of lending money at an extraordinary rate of interest under the mask of trading; and observed, that it was a question of more difficulty, what was the sum of which the account was to be taken, whether the value of the goods, or the sum really made. That in the case in Eq. Abr. 91, the Court thought proper to charge the person only with what he really made of the goods, and that this was the proper rule; for, that the person advancing the goods knew they were not to be sold in the shop, but in the lump, at a different kind of market; and that what could be got for them in that way, was all that would redound to the benefit of the party to whom they were advanced. Ord on the Law of Usury, p. 144.

[b] 1768, Creditors of Pitcairn *a.* Foggo, Dict. 4. 393. Mor. 16,432. In this case, it was decided that bankers are entitled to charge a commission not exceeding ½ per cent. on all money transactions for account of another. See also 6th June 1797, Playfair, Mor. 16,438.—A.

In England, ¼ per cent. is the commission usually charged by bankers on the discount of bills; but there is no rule of law to that effect, and a higher amount is allowed, according to the circumstances of the case, when the bills discounted are payable in another place, or where there has been extraordinary trouble or expense in keeping intricate accounts, or the like. Chitty, 85. The commission, however, must be ascribable strictly to trouble or expense, and not to the advance of money. Carstairs and others, assignees of Kensington & Co., *v.* Stein, 4 M. & S. 192. Here ½ per cent. was charged upon a very long and intricate account, the claim by Kensington & Co. against Scott, Smith, Stein, & Co. being L.314,581 : 3 : 6, of which L.53,000 was for commission. On the trial there was a contrariety of evidence as to the nature of this commission of ½ per cent., and its reasonableness in respect of trouble, &c. upon a banking-account,

Retaining interest at time of loan.

When a bill or note is discounted, the discount may be retained; the difference being paid over

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many of the witnesses stating, that the accustomed charge for a commission upon a banking-account never exceeded $\frac{1}{4}$ per cent. Lord Ellenborough, C. J. directed the jury upon the evidence, that if the commission could be fairly set to the account for trouble and inconvenience, it was not usurious; otherwise, if the commission overstepped the *bona fide* trouble, and was mixed with an advance of money, in order to effect an inducement for such advance from time to time. His Lordship inclined, in his charge to the jury, to the conclusion, that this commission was, under the circumstances, usurious; but left that question upon the evidence to the jury, who found it was not usurious. A rule for a new trial was afterwards refused by the Court. In Brooke *v.* Middleton, 1 Camp. 448, where the defendant, a waggon owner, had charged a commission of 7s. 6d. per cent. for discounting a bill, without evidence of his having been put to expense, or any considerable degree of trouble, the Court were strongly of opinion, that the transaction was usurious; but the jury having found for the defendant, the Court, holding that the jury were the proper judges of what was a fair recompense for trouble and expense in the discounting of a bill, refused to grant a new trial. In Walker *v.* Allan, 15th May 1800, Mor. 16,440, it appeared that the defender, a banker in Edinburgh, had been accustomed to charge commission on his accounts current, as also on some of the bills discounted by him; and that, on other occasions, instead of charging commission, he did not allow the usual exchange on bills. The rate of commission charged on bills varied, according to circumstances, from above one per cent. to a much less sum; and upon his whole transactions in this case, the extra charge, above interest, was under one-fourth per cent. It was observed on the bench, "that the whole accounts must be taken as an *unum quid*, and not divided into separate articles. The defender's charge, upon the whole, is less than what was recognised in the cases of Foggo & Playfair." The Court unanimously dismissed the action. On an appeal, the Lord Chancellor said,—"If the statute of Queen Anne be law for Scotland as well as England, it ordains that more than five per cent. for one year shall not be taken; otherwise usury. What has been held here in other cases, must also be the law in Scotland; namely, that whatever is taken above five per cent. shall be only compensation for trouble. *Onus probandi* lies on the takers,—bound to satisfy the Court that they have taken nothing but compensation for trouble. New to me, if I go to a merchant to discount a bill, and he takes more than five per cent., he has a right to do so. When cases of this kind first occurred, it was matter of consi-

to the person who gets the bill discounted. This is not to be reckoned merely as a loan of the balance; as, in that case, every banker who takes 5 per cent. for discounting bills, would be guilty of usury: for if, upon discounting an L.100 bill at 5 per cent., he deducts the L.5, he may be said to have lent only L.95, (that is, supposing the bill or note to have twelve months to run,) and he has received interest for L.5 more than the principal sum advanced, which is above the legal rate. But this doctrine is only applicable to bills, promissory-notes, and other negotiable instruments. On accounts current, indeed, as well as on bills discounted, a commission not exceeding ½ per cent., besides interest, may be charged by bankers. It does not, however, apply to bonds and other deeds.[e]

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deration whether the extent of compensation ought not to be regulated. That is now left to jury. But question always is, whether is it merely for trouble, and not for forbearance of money." The case was remitted back to the Court of Session, to review the interlocutors complained of generally. See Bell's Comm. I. 237.

[c] Ord on Usury, p. 59. 68. By stat. 1621, c. 28, it is statuted and ordained, "that no persoun who lendis or gevis out money, and ressavis annuel therefore, sall retene, the tyme of the lending, exact, crave, or ressave frome thair dettors, the annuel of the lent soumes, untill the terme of payment appoyntet by thair bandis be first come; and it shall be lauchful at the tyme of lending of monies, and making of bandis, to ade the annuel unto the principal soume, providing alwayes nather principal nor annuel be exacted or cravit before the terme of payment appoyntet by the said band; and the contravenaris of this present statute sall be punischit as unlawful userers."—As stated in the text, this enactment is held not to apply to the discounting of bills. See Chitty, 83. Bell's Comm. I. 238.

[d] 1800, Walker, &c. *a.* Allan, *sup.* Playfair *v.* Hotchkis, 6th June 1797, Mor. 16,438. See sup. note [b].

[e] The granter of several annuities (amounting to L.500) sub-

Game-debt.

A bill for L.8, whereof part was money won at drafts, was declared null upon the 9. Anne;

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ject to redemption, being desirous of repurchasing them, drew a bill for L.5000, payable to the grantees, or order, *three years* after date. The bill was given for the original purchase-money; the arrears of the annuities; a sum to be paid instead of giving notice of repurchase; and a sum paid down in cash, amounting, in all, to L.4250; the remaining L.750 being charged for *three years discount* on the bill. A bond was given by the granter and his sureties, in lieu of the bill, and for the like amount. A question arose on the validity of the bond. The legality of discounting bills in the way of trade was admitted by Lord Alvanley; and his Lordship observed, that if nothing more had been done in that case, than what always had been done by way of accommodation among merchants, the transaction was not usurious; but that the rule must be confined strictly to that sort of transaction; for that, if discount should be taken upon an advance of money, without the negotiation of a bill of exchange, it would amount to usury.

The case was considered by his Lordship to be a forbearance of L.4250 for three years, for which the party was to receive interest for L.5000. He also observed, that the jury were impressed with a notion, that a bill at three years was such as no reputable man would discount; though it was said that some East-India bills of two years date had been discounted. That Lord Chief-Justice Eyre seemed to have thought that the length of the date of the bill was sufficient to afford a presumption that the discount was intended as a cover for a loan; and that, if we considered the effect of discounting bills at very long dates, the strength of that presumption would be manifest; for that, if the practice should be carried to a great length, the interest would annihilate the principal. His Lordship therefore thought, that the discount of such a bill as that, not coupled with the transaction respecting the annuity, would have been almost sufficient to have afforded a presumption of usury; but coupled, as it was, with the redemption of that annuity, it was impossible to wink so hard as not to see what the real transaction was. His Lordship, accordingly, held the bond to be void. Marsh *v.* Martindale, 3 Bos. & Pul. 158. Ord, 68.

With regard to what is accounted an usurious exaction in discounting bills, the following cases may be quoted. King's Bench, Guildhall, December 18, 1793, Matthews *v.* Griffiths & Co. This was a *qui tam* action on the statute of usury. The defendants were bankers in Portsmouth, and, in several instances, had discounted bills for a Mrs Stewart, the proprietor of some silk

action being reserved to the holder against the debtor for payment of any furnishings or ad-

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works, at thirty days, at the rate of 5 per cent.; but, instead of giving cash, had given bills on London at three days sight. The fact was completely established by the evidence. Mr Erskine endeavoured to defend his clients, on the ground that it was the consent of both parties, and for the convenience of Mrs Stewart. The objection was overruled by Lord Kenyon, who said he considered it as usury, and no lawyer whatever would be of a different opinion. They ought to have deducted the discount for their bills. Manning, p. 66.

In the case Hammet *v.* Yea, 1 Bos. and Pul. 144, subsequently decided, where several promissory-notes were discounted by the plaintiffs, who were bankers, partly in cash, partly in account, and partly in bills on London at thirty days after date, and others of shorter dates, it was determined that there was nothing usurious in that mode of discounting. The defendant, in this case, had been asked by the discounter, how he would have the money; and had required bills on London for part of the amount. It was observed by Chief Justice Eyre, that had the bankers imposed this remittance on the borrower, as a term of the discount, it would have been usury. Ord, p. 60.

In a case where, on discounting a bill for the payee, the parties discounting it gave, in part payment, their acceptance of a bill, drawn on them by the payee, at three months date, it was taken for granted that that mode of discounting was usurious. *Ibid.* 66.

So it is in discounting a bill, if the party discounting gives goods in part, which are charged beyond the value. *Ibid.* 95. See above, p. 80, note [a].

G. took a note for L.200, when it had three months to run, in consideration of L.197; and at three months end took another note for L.300, on advancing L.3 for other three months. On being referred to a jury, it was found to be an usurious loan. *Ibid.*—A.

Payment by an accepter before the bill becomes due is not usury. Barclay *v.* Walmsley, 4 East, 57.

It seems to be held as usury, that one has given or lent his acceptance, on an agreement to have a commission for doing so. Bell, I. 237.

If a previous debt subsisted at granting the bill, it will not be forfeited on account of usury in the bill; and an action may be maintained on the original evidence of the debt. Philips *v.* Cockayne, 3 Camp. 119. Dun *v.* Colquhoun, *supra.* If the usurious security is cancelled, and a new document for the sum truly due granted, it will be unexceptionable. Barnes *v.* Headley, 2 Taunt.

vances made to him separate from the game-debt.[f]

A bill of exchange was given at Paris by Sir John Bland to Robinson, for L.672, of which sum L.300 was money *lent*, at the time and place of play, to Sir John; and L.372 *lost*, at the same time and place, by him to Robinson. In an action brought for payment of the bill, at the instance of the latter, against the administratrix of Sir John, Lord Mansfield, after delivering at large the opinion of the Court, concluded with saying,—"As to the money won, we think it cannot be recovered. As to the money lent, it appears to have been fairly and *bona fide* lent, without any imputation what-

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184. Chitty, 78. 82. But if the usurious sum is included, it will be as invalid as the former. Preston *v.* Jackson, 2 Stark. 237. Bayley, 408.

Where a bond was given, in lieu of bills, to a person not privy to the usury of prior parties, it was accounted valid. P. on discounting several promissory-notes, took usurious interest. He afterwards obtained credit for them of the plaintiffs (his bankers,) who had no knowledge of the usurious transaction between P. and the defendant (the maker of the notes.) When the notes became due, the maker was applied to for payment; but the notes were destroyed by agreement, and a bond given by the maker to the bankers for the amount. The bond was held good by the whole Court. Ord, p. 137. It was in this case observed by Justice Grose, that the consideration of the bond was the giving up of the bills; but the bond was not given for the money lent by P. to the defendant.

[f] 1767, MacCoul *a.* Braidwood, Fac. Coll. No 21. p. 105. Mor. 9518. The statute 9 Anne, ch. 14, declares all notes, bills, &c., of which the whole or any part of the consideration is money won by gaming or betting, or lent to persons gaming or betting, to be "utterly void, frustrate, and of none effect to all intents and purposes whatsoever." (See ch. v. as to the liability of an indorsee to this objection.)

ever; and the plaintiff is entitled to it, both by the law of England and by the law of France.[g]

Value given in smuggled goods is an unlawful

Smuggled goods.

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[g] Robinson *v.* Bland, 2. Bur. 1077. Disney's Laws of Gaming, p. 86.

In a question relative to the validity of a bill granted as the amount of a wager lost on a horse-race, the Lords found, that the statute 14. Parl. 1621, relative to game-debts, was not in desuetude. By this act it is declared, that wherever any person wins above 100 merks within twenty-four hours, upon cards, dice, or horse-racing, the surplus shall, within twenty-four hours thereafter, be consigned in the hands of the kirk-treasurer, if in Edinburgh, or of the kirk-session in the country, to be applied for the use of the poor. 1774, Maxwell *a.* Blair, Fac. Coll. No 126. p. 338. Mor. 9522.

In England, horse-racing is authorised under certain regulations, by 13 Geo. II. c. 19. And securities given for money won at a horse-race, where the stake is more than L.50, are not void; because, as the race itself is made lawful under these circumstances, the consequences should be so too. Disney, p. 28. But the persons betting must be the proper *owners.* Wagers exceeding L.10, between third parties, fall under the statutes 16 Car. II. c. 7. & 9 Anne, c. 14, relative to gaming debts, and are not recoverable. If the race itself be illegal, that is, if the stake be under L.50, any bet upon it, though not exceeding L.10, is illegal also. A wager, to be good under the act, must be on *bona fide* horse-racing, upon race-grounds, and not on races against time. *Ibid.* ch. *3. passim.* Though, it would appear, that a contract on a trotting-match was not considered as illegal. Robson *v.* Hall, Peake's Cas. N. P. p. 127.

In Scotland, a decision the reverse of this was given in Wordsworth *a.* Pettigrew, 1799. Fac. Coll. No 123. p. 281. Mor. 9524.—A.

In this case, the Court were unanimous in thinking, that action could not lie for claims of this sort. It was observed, that this was not founded on the statutes against gaming, but on common law. Courts of justice were instituted to enforce the rights of parties arising from serious transactions, and can pay no regard *sponsionibus ludicris.* See also Cuming Gordon *v.* Campbell, 16th Nov. 1804, Mor. App. to *Pactum illicitum,* No 3; and Bruce *v.* Ross, 26th Jan. 1787, Mor. 9523, where actions for sums gained on wagers were dismissed. The latter case was affirmed in the House of Lords; and the law is quite fixed in Scotland, that a claim for a wager is not tenable in a court of justice. Bell's Comm. I. 233-4.

consideration. Two persons having been engaged in a smuggling adventure, the one granted a bill to the other for the value of his share of the profits. The goods being afterwards seized, the Lords refused action for payment of the bill.[h] If the contracts arising from illicit transactions of this description were sustained, it is evident that the revenue, and general interests of the country, might be materially injured. The Court has therefore shown a disposition to cut down all deeds, of whatever denomination, granted for, or on account of, a smuggling or contraband consideration, if the parties were in the knowledge of the nature of the transaction.[i]

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[h] 1776, Duncan *a.* Thomson, Dict. v. 4. p. 32, Mor. 9546, and App. to *Pactum illicitum,* No 1. 1779, Feb. 26, M'Lure & M'Cree *v.* Paterson. *Ibid.* In these cases the parties were participators in the act of smuggling.

[i] An heritable bond was granted for the price of smuggled goods, by a merchant in Scotland to his correspondent in Holland, who was accessary to the importation: the bond was assigned for value to a third person, who took infeftment on it. On the bankruptcy of the debtor in the bond, the trustee for his creditors brought a reduction of the security, on the score of its being *pactum illicitum,* and the Lords reduced it accordingly. Nisbet's Creditors *a.* Robertson, Bell's Dec. p. 349, Mor. 9554.—A.

The interlocutor, in this case, of the Lord Ordinary, (M'Queen,) which was adhered to by the Court, found, "that the objection is, in this case, a good objection against Mr Robertson, in respect that every objection that would be good against a cedent would be good against the most onerous assignee; and finds, that the infeftment proceeding upon the heritable bond will not vary the case, in respect, that although an infeftment upon a right in security may be a good bar to any personal exception that may lie against the security, yet it does not bar personal exceptions against the debt secured." An onerous and *bona fide* indorsee to a bill, who is not in general liable to the objections competent against the prior parties, is not affected by the circumstance of the original value having been smuggled goods. See ch. v.

Bills, for the price of smuggled goods, were accepted by Philp, payable to Potts, and indorsed by him to Sir William Forbes & Co., for behoof of Cullen & Co., to whose account they were immediately placed. Philp being charged for payment by their attorney, brought a suspension, and, after a discussion of the reasons, the Lords suspended the letters *simpliciter*, thereby finding, that no action could be maintained on the bills.[k] In this case, a rule was adopted by the Court, that if goods were sold to a smuggler by a merchant settled abroad, whether a native of this country or not, and delivered on the spot, he can maintain action for them, though he suspected, or even knew they were meant to be smuggled into Britain. But if he was accessary to the smuggling, and thereby to an infringement of the laws of the land, (which he is bound to know as far as concerns his trade,) he cannot demand the aid of the British courts for recovery of his debt.

A similar decision was given in Reid & Parkinson *a.* Macdonald, &c. where bills granted for

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[k] 1793, Cullen's Attorney *a.* Philp, Fac. Coll. No 49. p. 102. Mor. 9554.

It would appear, however, that if the contraband goods sold, have been circulating from hand to hand in the country, a claim for the price, by parties who have had no concern with the act of smuggling, will be sustained. See M'Lean *v.* Sword, 5th Dec 1788. Mor. 9549.

It was so held, even when the claim was made by the *original importer,* in Commissioners of Customs *v.* Morrison, 27th Nov. 1723, Mor. 9533. Wilkie *v.* M'Neil, 6th Nov. 1740, Mor. 9538. But these cases have since been much doubted. See Brown on Sale, 137-47. Bell's Comm. I. 236.

smuggled goods were found not actionable in the hands of persons to whom they had been indorsed without value; it being shown, that the indorser of the bills was an agent of the persons by whom the goods had been furnished, who were privy to, and concerned in, the transaction.[l]

It was found, that no action could lie upon a bill accepted for payment of an apprentice-fee, where the indenture, which was the cause of granting the bill, was void by the eighth of Queen Anne.[m] It is no ground, however, of reducing bills granted for an apprentice-fee, that the sum was not inserted in the indenture, nor the principal indenture stamped,—if the master have subjoined the sum to an extract of the indenture, and got the extract stamped on payment of the duty, though done after the death of the apprentice.[n]

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[l] 1793, Fac. Coll. No 50. p. 103. Mor. 9555.

[m] 1754, Donaldson *a.* Fulton, Fac. Coll. No 98. p. 146. Mor. 587. The act requires the amount of the apprentice-fee to be stated in the indenture, which had been omitted.

[n] Shepperd *a.* Innes, *Ibid.* No 267, p. 498. Mor. 589.

There are many cases, in addition to those mentioned in the text, where the law denies action on a bill, on account of the nature of the consideration for which it was granted. All obligations arising out of transactions, which are of an immoral nature, or are contrary to the sound policy of the state, are in this situation. It is obvious that these cases, some of which are provided for by express statute, and others are left to the operation of the common law, must be very numerous; and it is unnecessary to detail more than the following:—

1. By act 20 Geo. II. ch. 40, in order to prevent dram-drinking, no action is maintainable for the price of spirituous liquors, unless the amount for quantities furnished at one time is 20s. or

In law, a bill granted for value is called an *onerous* bill: where no value has been received, it is called *gratuitous*.

Bills having been introduced for facilitating commerce, and not to convey gratuities, a legacy, Bill to constitute a legacy.

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upwards. Opposite decisions have been pronounced on the point, whether a bill of exchange for a consideration of this kind is valid. In Scott *v.* Gilmore, 3 Taunt. 226, Lord Mansfield, C. J. held a bill, partly made up of such sums, to be void *in toto*. Bayley, 405, is also of that opinion. But in Spenser *v.* Smith, 3 Camp. 9, Lord Ellenborough decided that a bill for L.6, granted by a recruiting officer for spirits procured in small quantities for the men under his command, was not struck at by the statute. Mr Bell, Comm. I. 233, mentions a case, Russel *v.* Russel, 6th July 1808, *not reported*, where the Court of Session refused to give effect to a bill granted for a consideration of this sort. The statute, however, is held, in England, inapplicable to the price of liquor sold, not for consumption by the customer, but for the purpose of being resold by him, Jackson *v.* Attrill, Peake, 180.

2. An obligation to pay a sum to one, on condition of his bringing about a marriage between certain persons, has been often denied effect to. Campbell *v.* Barns and Stewart, 6th June 1678. Mor. 9505. Thomson *v.* M'Kaile, 14th Feb. 1770. Mor. 9519. But actual expense will perhaps be allowed, Earl of Buchan *v.* Cochrane, 1698, Mor. 9507 & 4544.

3. A bill, or other obligation, by one to a woman living in adultery with him, is null if granted as an inducement to enter into or continue such a connexion; but not if granted as a reparation to the woman, or as a provision to the children, 26th June 1765, Hamilton *v.* Degares, Mor. 9471. Ross *v.* Robertson, 25th June 1642, Mor. 9470. Bayley, 402.

4. By the present bankrupt statute, 54 Geo. III. ch. 137, all private agreements with particular creditors, securing them gratuities or higher compositions, on condition of their agreeing to measures in favour of the bankrupt, are prohibited; and it is declared, § 61, "that no action shall lie upon any bill or other security granted in consequence thereof." See Bell's Comm. II. 475, *et seq.* In the English case of Bryant *v.* Christie, 1 Stark. 329, in which it appeared that Back, a creditor of Christie, had stipulated full payment of his debt from Bryant, before he would agree to sign Christie's discharge, action on bills by Christie to reimburse Bryant was refused, on the ground of this being a fraud on the creditors at large.

For the liability of indorsees to such objections, see ch. v.

or *donatio mortis causa*, cannot be effectually constituted by bill;[o] nor is a bill granted on death-bed a legal method of constituting a debt or legacy, even to affect moveables, in so far as the bill is gratuitous.[p] But the legacy may be effected, by the donor's granting a bill to a person in his confidence, who, at the same time, grants equivalent bills to the intended donees,—the bill, in this case, granted to the interposed person, not being a donation, but given for a specific value, *viz.* the equivalent bills accepted by him in favour of the donees, in the same manner as if the money itself had been paid to the latter.[q]

Granted on death-bed.

The objection to a bill, that it was granted on death-bed, without value, in order to constitute a legacy, and that it was not subscribed by the drawer till after the accepter's death, was not sustained as relevant against an onerous indorsee. The bill, in this case, was delivered to a third party, before the accepter's death, for the drawer's

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[o] 1722, Fulton & Clark *a.* Blair, Dict. v. 1. p. 95, Mor. 1411.—1736, Weir *a.* Parkhill, *Ibid*, Mor. 1413.—1761, Wright *a.* Wrights, Fac. Coll. No 20, p. 37. Mor. 8088.—1786, Dowie *a.* Millie, *Ibid.* No 254. p. 309, Mor. 8107.

[p] 1724, Huttons *a.* Hutton, Dict. v. 1. p. 95, Mor. 1412.

[q] 1782, Adam *a.* Johnston, Fac. Coll. No 74, p. 113, Mor. 1416. In this case, it was observed on the bench, that prior to the act limiting to six years the commencement of an action on bills of exchange, as they might have been brought into suit at any time within the period of the long prescription (forty years,) there was evidently a much greater danger of frauds being committed by means of them, than there has been since that enactment. Hence, these documents are to be construed with less suspicion and strictness than formerly. But see Dowie *v.* Millie, *sup.*

behoof; and no deed, after delivery, is presumed to be a *donatio mortis causa*.[r]

Indorsation on death-bed.

A husband on death-bed gave his wife, in presence of witnesses, two bills, blank indorsed, desiring her to keep them for her own use. On the husband's decease, his executors having brought an action for delivery of these bills, it was found that this was a donation betwixt man and wife, unrevoked, and that, therefore, the bills belonged to the relict.[s] And in the case, Provan *a.* Calder, a gratuitous bill of L.100, granted on a promise of marriage, was sustained, although marriage did not follow.[t]

Value in services.

A bill, given as a reward of services, is good. Steel, in February 1790, granted to Wemyss, 'as a consideration for his services and trouble,' a promissory-note for L.500, payable at the following Whitsunday. In payment of which, he, on the 7th June, gave him the following check or draft on the Bank of Scotland:—"On sight, pay to David Wemyss, or his order, five hundred pounds Sterling; which place to my account without further advice." In an action of reduction brought by Steel's disponees, the Court

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[r] 1751, Shaw *a.* Farquhar, Fac. Coll. No 65, p. 149, Mor. 1444. In deciding this case, the Court went upon the ground, that an objection of this kind is not competent against an onerous indorsee. The delivery of the bill was of no consequence in this question, and, if it had occurred with the drawer himself, the plea of no value would have been conclusive.

[s] 1753, Barbour and Blackwood *a.* Hair, *Ibid.* No 62, p. 95. Mor. 6097.

[t] 1742, Kames, Rem. Dec. v. 2, No 30, p. 46. Mor. 9511.

sustained the promissory-note and relative draft.[u]

In account. Bills are often drawn for value *in account*, which is the ordinary style of drawing foreign bills by merchants, who are in habits of commercial dealings with different countries, and have numerous transactions and current accounts with the persons drawn upon. A bill drawn and accepted in this way, does not always imply that the accepter had actually value in his hands at the time. On the contrary, it is a very frequent mode of drawing, for the sole accommodation and behoof of the drawer.[v] Neither does the remittance of a bill of this description to the correspondent, though made payable to him, transfer the property of the bill, unless he can show that he is creditor of the remitter on a balance of accounts.[w]

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[u] 1793, Disponees of Steel *a.* Wemyss, Fac. Coll. No 62, p. 95. Mor. 1409.

[v] A bill drawn "for value in account" is considered to be an order on the accepter either to open or continue open an account, and the drawer must show that the balance was in his favour. Tait on Evidence, 477. When a bill is drawn in this manner, "Pay A B, or order, *value received*," the meaning is held to be, that value has been received by the drawer from the *payee*, Chitty, 67. But the general opinion is, that a drawee also who accepts a bill, is, *in dubio*, to be presumed to have funds of the drawer in his hands. If he had not, he should have accepted *supra* protest. See post. ch. v.

[w] 1741, Forbes *a.* Fonnereau, Home, No 175, p. 291. Mor. 1472. In this case, bills had been indorsed by Andrew Forbes to his brother, Alexander Forbes, "for value in account." On the death of the latter, Fonnereau, a creditor, attached some of these bills as executor-creditor. Andrew, in whose favour a considerable balance was due on his accounts with Alexander, brought an action for having it declared, that the property of the bills remained with him. The Court granted decree in his favour,

Bills should always be addressed to the person drawn upon, and his name and designation correctly expressed; but the want of a special address or direction is supplied by acceptance; for the address serves merely to mark out him to whom a bill is to be presented for acceptance, and when an accepter appears, even though the address be wanting, he is presumed to be the person the drawer had in his eye.[x] It is said, that if the drawer of a foreign bill omit to address it, but has advised his correspondent of his having drawn upon him for the amount, the bill may be presented to him, and protested if not accepted, so as to make the drawer liable in charges; and that the person so advised ought to accept, if he has funds of the drawer in his hands.[y] Drawee.

Bills of exchange sometimes conclude with the words *as per advice*, in which case a letter of advice from the drawer generally accompanies the bill. Such bills cannot be safely paid until the letter of advice arrive; nor can the drawee safely pay, if the bill and letter of advice do not tally;[z] but he may, in all cases, pay without wait- *Per advice.*

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"except in so far as the executor-creditor shall make appear, that Alexander Forbes, either by payment, or his acceptance of bills drawn on him by his brother Andrew, stands creditor to Andrew." (See ch. XII.) A *bona fide* indorsee would not have been liable to this objection.

[x] 1727, Grierson *a.* Sutherland, Kam. Rem. Dec. v. 1, No 96 and 97, p. 189. Mor. 1447.

[y] Mar. p. 142.

[z] Malyne, ch. 6, obs. 8.

ing for the letter of advice, *supra* protest, and will thereby keep the drawer bound.[a]

Bills are also sometimes made payable "without further advice;" in which case, the drawer may pay whenever the bill becomes due.[b]

Effect of vitiations or alterations.

If a bill in the hands of the payee or holder be altered or vitiated in any material respect, it is rendered null, and the parties are freed from the obligation thereby created.

Scaccia proposes this question. The holder of a bill of exchange falsifies it, and writes a larger sum than that which the bill bore. The falsification is made in such a manner as to deceive an attentive and intelligent observer. The banker, deceived by the appearance of the bill presented to him, pays the entire sum to the holder; ought he to have recourse upon the drawer for more than the sum for which the bill was originally and actually drawn? Scaccia decides in the affirmative.[c] Pothier thinks that the drawer is not liable in repetition (repayment) of the sum, in as much as the falsification of the bill was a fortuitous case, which he could neither foresee nor pre-

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[a] Scaccia, Tract. de Commerciis et Cambio. § 2. gloss. 5. n. 358. The accepter is not in safety to pay, even *supra* protest, till he receives the letter of advice. Chitty, 89.

[b] Poth. n. 36. 169.

[c] Tract. de Com. § 2. gl. 5. quæst. 15.—And this far may be said in support of his opinion, that according to the rules of the contract of mandate, the mandate is obliged to reimburse the mandatory for all disbursements to which the mandate has given occasion; provided the mandatory has not, by his own fault, disbursed more than was necessary. "Mandator debet refundere mandatario quidquid ei inculpabiliter abest ex causa mandati." Pand. Justin. tit. Mand. No 53. de Poth.—A.

vent, and with which, therefore, he could not be said to charge himself. But if the loss arose from any fault of the drawer in making out the bill in such a manner as to afford room for an alteration or addition, he conceives the drawer would be liable, as he ought to have drawn his bill in such a manner as prevent falsification. From whence, says he, it results, that one ought not to decide indiscriminately, that the drawer is bound to indemnify the banker for the loss into which he was betrayed by the falsification of the bill; on the contrary, he is only liable to such claim of indemnity, when, by any fault on the part of him or his agent, he has given occasion to the falsification, by drawing the bill, without taking the proper precautions, which he might have taken, to exclude it. But if the falsification might have been discovered by a careful examination of the bill, the blame attaches to the banker in having paid it, as he ought to have inspected it minutely; and he is not entitled to demand indemnification for a loss arising from his own fault or negligence.[d]

Effect of alterations and vitiations.

Boucher is of opinion, that the banker ought to sustain the loss, for accepting and paying the bill without a letter of advice, which he ought not to have done, and should therefore suffer for his imprudence.[e] But the perspicacity of Pothier cannot often be arraigned. The case might evi-

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[d] Part 1. ch. 4. Art. 3. n. 101.

[e] Inst. Com. n. 1110.

Effect of alterations and vitiations.

dently occur, where no letter of advice could be given or required, as actually happened in that of Graham *a.* Gillespie & Co., 1795, where there was an example of both of the hypothetical cases mentioned by Pothier; and the Court decided in exact conformity with the principles laid down by that sagacious commentator. The accepter was found liable to indemnify the discounter for the whole sum, in a bill which he had accepted with vacant spaces; by means of which, the holder had been enabled to alter and augment the original sum; but he was not found liable to repay the contents of a bill, the falsification of which had given it a crowded and suspicious appearance, and might have been detected by an accurate inspection. The bill was considered to be vitiated *in toto*, and not to be actionable even for its original amount.[f]

In the same manner, when a bill had been altered, in so far as the words "on demand" had been erazed, and the words "one day after date" substituted in their place, it was found that no action could lie on the bill so vitiated. The bill, by the alteration, was not the contract of the parties; and, independent of the bill, there was no pretence for the holder saying he was entitled to recover upon any other footing.[g] By the vi-

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[f] Dict. v. 3. p. 76. *supra* p. 65.

[g] Though in the special case detailed below, there could be no claim against the defender but through the bill, yet, where there is a separate debt due by the accepter, independent of the bill, it may be recovered by an action.

tiation, the bill was considered as annihilated, and it could not be restored, or made a ground of demand.[h]

Effect of alterations and vitiations.

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[h] 1801, December 26, Lee *v.* Murdoch Robertson & Co. This case was decided upon an appeal to the House of Lords. It is not yet collected in any of the volumes of Decisions. The following report, taken by a person on the spot, has been communicated to the author.

Robert Donald was a partner in a banking-house at Glasgow, carried on first under the firm of Spiers, Murdoch, and Co., and afterwards that of Murdoch Robertson & Co. Mr Donald was likewise a partner in the mercantile house of Lee, Rodger, & Co., of which Mr Lee, the appellant's father (now dead), was also a partner. Mr Donald, in his individual capacity, had a cash-account with the bank of Spiers Murdoch & Co.; and, having overdrawn it, he, with a view to reduce the balance upon it, gave the bank, without the knowledge of Mr Lee, the acceptance of Lee Rodger & Co. for L.1000, payable in six months. This bill was not paid when it fell due; and afterwards a new bill, payable on demand, was taken by the bank, from Lee Rodger & Co. (still without the knowledge of Mr Lee) for the principal and interest, amounting together to L.1068 : 19 : 7; and the former bill was upon this occasion delivered up. The second bill was allowed to lie over for several years; but the holders, the respondents, at length brought an action for payment of it against Mr Lee the appellant. In the course of the proceedings, it appeared that the bill had been altered, in so far as the words "on demand" had been erazed, and the words "one day after date" substituted in their place: and upon the judicial examination of Mr Robertson, the cashier of the bank, it was acknowledged that the alteration had been made immediately before commencing the action, in order to found the bank in a claim for interest, which they could not have maintained on the bill as it originally stood. The Court of Session, after various proceedings, upon the 4th of July 1798, pronounced the following interlocutor:—"Find the defender liable to the pursuers for the sum of L.1000, contained in the original bill granted by Lee, Rodger, and Co., with interest thereon; and remit to the Lord Ordinary to allow the pursuers to amend the libel to that effect, and to proceed and determine as to his Lordship shall seem just." Both parties preferred reclaiming petitions against this interlocutor; and upon the 11th February 1800, their Lordships pronounced this other interlocutor:—"Find, that the meaning of the Court, when they pronounced the judgment reclaimed against, was to sustain the claim of the pursuers to such an extent, so that the same should not exceed the sum of L.1068, 19s. 7d., and the interest thereof from the 23d February 1786,

Effect of alterations and vitiations.

But if the bill is altered before acceptance or indorsement, the accepter cannot take any advantage of the alteration, as the consent of parties

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until payment: Find the defender, Robert Lee, liable in these sums accordingly; and, with this explanation, they adhere to their former interlocutor: And further, Find the defender liable in the full expense of extract, but in no other expenses, and decern." From these interlocutors Mr Lee appealed to the House of Lords; and after counsel had been heard at great length, the Lord Chancellor observed, that had an action been brought in England upon the second bill, it would have been sufficient, laying all the other circumstances of the case out of consideration, to have stated, that the bill, in consequence of the alteration, was not the contract of the parties; and the respondents could not have recovered upon any other of the usual counts, such as money had and received, &c., because there was no pretence for saying that Mr Lee was debtor to the respondents independently of the bill. The transaction by which the first bill was pledged was one between Donald and the respondents, to which Mr Lee was no party; at best, the first bill was to be considered as a voluntary obligation on the part of Mr Lee, which the respondents had abandoned. They had delivered back the bill; and, after that, could Mr Lee have been compelled to have renewed it? Could he have been subjected as under an engagement which the respondents had discharged? It appeared to his Lordship, that Mr Lee was in the same situation as if demand on both bills had been abandoned: and on what other ground could an action be maintained against him? His Lordship said, he did not mean to give any opinion with regard to the first bill, but only to state, that very important defences might be offered to any action grounded upon it; and that it appeared to him that the appellant, by the course adopted, had been precluded from stating such defences. The first interlocutor seemed to proceed upon the supposition that the libel had been amended, and the defences overruled; which was contrary to the record as it stood, and to fact; and the last interlocutor, although it was difficult to understand it, appeared to proceed upon the second bill, as if it had been restored to its original state. But his Lordship again observed, that the alteration of that bill—the voluntary, if not criminal act of the pursuers, had annihilated it, and it could not be restored, or made a ground of demand. His Lordship concluded with moving, "That the interlocutors complained of be reversed; but without prejudice to the pursuers bringing any action on, or in respect of, the original bill for L.1000 granted by Lee, Rodger, & Co., as effectually as if they had amended their libel according to the terms of the first interlocutor complained of." Which was ordered accordingly.—A.

to the alteration is in this case to be presumed.[i] Action accordingly was sustained on a bill, in which the accepter, at the time of accepting, altered the sum from L.60 to L.50, intimating, at the same time, that he chose to pay the interest, which was L10, before payment of the principal sum; and in this state sent back the bill to the

Effect of alterations and vitiations.

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[i] Beawes, n. 194. Mar. 140, 141. Scarlett, c. 10, R. 40. If the alteration be *immaterial*, such as inserting the words "or order," or the address of the accepter, as a direction where to call for payment, it will not invalidate the bill, at whatever time it may be made, Chitty, 102. Mill *v.* Russell, 16th January 1810, Fac. Coll., where an indorsee, through ignorance, wrote his name above the drawer's, and afterwards deleted it. The objection was repelled.

A *material* alteration may be made before the bill has been accepted, or has gone into circulation, provided it be made with consent of the whole parties. Laidlaw *v.* Park, *post.* Fairweather *v.* Allison, 12th February 1817, Fac. Coll., where an alteration of the date by the drawee at accepting was disregarded. The case, Bryce *v.* Dickson, 16th November 1810, Fac. Coll., where the correction of a mistake, by substituting "Candlemas" for "Lammas," made at acceptance, was held to create a nullity, will probably not be followed. Bell's Comm. I. 305, No 385. See also Henderson *v.* Hay, 20th Feb. 1802, Mor. 17,059. Sutherland *v.* Morrison, 1st July 1823, Shaw's Rep. II. 442.

But if the alteration be both in a material part of the bill, and have been made without consent of the parties, it will have the effect of invalidating it. Murchie *v.* Macfarlane, 1st July 1796, Mor. 1458, where the date had been altered from "7th" to "17th" June. Allan *v.* Young, 5th March 1800, Mor. App. to Bill of Exchange, No 10. Callender *v.* Kirkpatrick and others, 10th Dec. 1812, Fac. Coll. In this case, an indorsee, by mistake, deleted the subscription of one of the drawers, which was held to destroy the document. Russell *v.* Macnab, 14th Dec. 1822. Shaw's Rep. II. 88, in which the date had been altered from 1811 to 1814. The action on the bill was dismissed, reserving to the pursuer to bring a new action for the debt. M'Ara *v.* Watson, 3d June 1823. *Ib.* 360. The same is the law in England, Chitty, 100.

Another objection to bills which have been altered, even though by consent, in a material part, after being issued, is drawn from the stamp-laws. See p. 66, *supra,* note [1]. Fleming & Leiper *v.* Scott, 1st July 1823, Shaw's Rep. II. 446.

Effect of alterations and vitiations.

drawer. The objection of vitiation was made by the representative of the accepter; but, in respect of the special circumstances of the alteration having been made by the accepter himself, and that the sum was less, which was in his favour, the Court sustained the bill to the extent of L.50, the sum claimed.[k]

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[k] 1774, Laidlaw *a.* Park, Dict. v. 4. p. 412. Mor. 16941.

A bill, it is said, is of no force, if the place at which it bears to be drawn be false. Peter at Paris drew a bill on Alexander, payable to John, which bill he dated at Lyons, 23d May 1777. When the bill became due it was not paid. John pursued for payment. It was proved that Peter, the drawer, was at Paris, and not at Lyons, on the 23d May. The bill was annulled. Boucher, No 1241. Boucher, with some reason, questions the soundness of the principles on which this decision was given. If the drawer was a native of Lyons, he might have dated the bill, by habit or mistake, at Paris, without any intention to defraud or deceive.—A.

# CHAP. IV.

## OF ACCEPTANCE.

THE acceptance of a bill of exchange, is an engagement to pay its contents according to its tenor.

The granting of a promissory-note is equivalent to the acceptance of a bill, for it is an obligation to pay the money for which the note is given; and inland bills payable to the drawer, being of the nature of promissory-notes, the acceptance of them constitutes an engagement on the part of the accepter similar to that of the granter of a note. Nothing, therefore, of what is to be discussed under the title of this chapter, will be applicable to promissory-notes, and very little of it to bills payable to the drawer. It will chiefly relate to foreign and inland bills, having three parties to them,—a drawer, drawee, and payee; where the recourse of the last upon the first, in the event of the second refusing to accept, must be secured by a protest for non-acceptance.

The subject may be divided into four parts: 1*st*, Of the obligation upon, and steps to be taken by the holder to procure acceptance. 2*dly*, Of the different modes of acceptance, and what constitutes an acceptance. 3*dly*, Of the effect of acceptance, and in what cases it may be refused. And, 4*thly*, Of the acceptance *supra* protest.

Mode of obtaining acceptance.

I. The holder of a bill ought, immediately on receiving it, to present it for acceptance at the usual house of business of the drawee,[a] and in case of a refusal, to protest it for non-acceptance;[b] for no days of grace are allowed prior to a protest of non-acceptance, as in the case of non-payment. It is customary, however, for the *porteur* to leave the bill twenty-four hours with the drawee, if he requires it, to enable him to discover, by examining his books, whether he has effects of the drawer in his hands or not; but the bill, it is said,[c] must either be accepted or protested before the departure of the next post.

When bills payable at or after sight should be presented for acceptance.

It is generally admitted, that a bill payable at or after sight, should be presented for acceptance

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[a] Mar. 61, 112. If the drawer is not in trade, it should be presented to himself personally, or at his place of residence. If he has removed from his former house, or is not to be found, or is dead, the same rules apply as in the case of presentment for payment, see ch. vi.

[b] Molloy, b. 2. c. 10. § 15.—Sav. tom. 1. liv. 3. c. 5.—Chitty, 159.

[c] Maylne, c. 6. obs. 1.—Beawes, n. 17.—Savary, tome. 1. l. 3, c. 5. If the drawee, before the termination of the twenty-four hours, declare that he will not accept, a protest must immediately be taken.

as soon as convenient, both in order to fix the period when it is to be paid, and to preclude all reflections on the payee, in case of the drawee's insolvency and the money perishing in his hands, as well as to afford recourse on the drawer, which may be lost by an undue delay in getting it accepted.[d] But it has been held that this necessity

Payable at a day certain.

[d] Ord. de Com. t. 5. art. 16.—Savary, tome 2, par. 17.—Beawes, § 266.—Bayley, Sum. 183-4.—Chitty, 159. There is no fixed rule for judging of the time within which bills of this kind must be presented to the drawee; the reasonableness of the time taken by the holder must depend upon the circumstances of each case. But it may be observed, 1*st*, That the holder will lose his recourse, if he keep such a bill in his own custody for a considerable length of time; and, 2*d*, That as long as the bill continues in constant circulation in the market, at a distance from the place of payment, there is no necessity to present it to the drawee. Bayley, 183. Muilman *v.* D'Eguino, 2. Hen. Bla. 565.—This was a question as to bills drawn on India at 60 days after sight; they bore date 5th March 1793, and were not presented for acceptance till 5th October;—verdict for plaintiff;—and on motion for new trial, per Buller, J.,—" the only rule I know of, which can be applied to the case of bills of exchange is, that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be foreign or inland, or whether it be payable at sight or at so many days after, or any other manner. But I think a rule may thus far be laid down as to laches (neglect), with regard to bills payable at sight or a certain time after sight, namely, that they ought to be put in circulation; and if a bill, drawn at three days sight, were kept out in that way for a year, I cannot say that there would be laches; but if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of laches; but further than this no rule can be laid down." The other Judges expressed opinions to the same effect.—Goupy *v.* Harden, 7. Taunt, 159, 162,—Where a claim was made by the indorsees of two bills against the payees; they were drawn on 12th May 1815, in London, upon Gould and Co. of Lisbon, at thirty days after sight, and were transmitted through many different hands by indorsation, till they were at last, on 22d August, presented for acceptance, and refused. It was proved that the drawees paid their bills to the 30th June 1815, and it was stated, the drawers had continued solvent more than two months after the date of the bills.—Per Gibbs, C. J. " the dis-

does not apply to bills payable on a day certain, as the time goes on whether the bills be accepted or not; and that the holder is not bound to present them till the money is due.[e] In this country a doctrine precisely the reverse has been maintained; and it has been urged, as a general point of law,[f] that a bill drawn at sight requires not the same rigorous negotiation with a bill payable at a day certain; that where a bill is drawn at sight, or so many days after sight, the holder has a discretionary power to present the bill sooner or later, as his exigencies require; that it is not to be supposed he will lie out of his money longer than is necessary; and that the delay in presenting it is favourable to the drawer, who cannot be debited with the money till his bill is

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tinction is, between bills, payable at a certain number of days after date, and bills payable at a certain number of days after sight. In the former the holder is bound to use all due diligence, and to present such bill at its maturity; but in the latter case, he has a right to put the bill into circulation before he presents it, and then, of course, it is uncertain when it will be presented to the drawee. It is to the prejudice of the holder if he delays to do it, and he loses his money and his interest;—there are *dicta* that it ought to be done in a reasonable time." Verdict for plaintiffs, and a motion to set aside the verdict was afterwards refused.—Fry *v.* Hill, 7 Taunt. 397. It was here found not to be undue delay in the payee of a bill drawn payable at a month after sight, from Windsor, on a banker in London, to present it for acceptance *four days* after its date, the drawee having failed in the interim.

[e] Molloy, b. 2. c. 10. § 16.—Beawes, *ut supra.*—Bayley, 182.

[f] Innes *v.* Gordon, Dict. v. 1. p. 101. Mor. 1562.—Andrew *a.* Syme, Dict. v. 3. p. 86. Mor. 1584.—In these cases it is stated in the argument too broadly, that the holder of a bill payable at or after sight, has a *discretionary* power of presenting it according to his convenience. The English cases cited above, state the law more correctly.—See also Falls *v.* Porterfield, *post. p.* 110.

presented. There certainly does appear to be the same necessity for immediate presentment in both cases, and even more so in a bill payable at a certain day than at a bill payable after sight. In the one case, the precise day of payment, and the period within which the bill must be negotiated in all its steps, is fixed and limited by the drawer himself, who therefore expects that the bill will either be accepted by the drawee within that time, or returned to him with advice of the dishonour; in the other there is no precise restriction as to time, except that of the days or months to run after the presentment has been made by the payee; but, in both cases, the drawer must rely on his bill being duly presented for acceptance, and on the holder being bound to exact diligence. For, suppose a bill drawn payable three months after date, and delivered to the payee, who duly presents it to be accepted, and, on a refusal on the part of the drawee, protests it for non-acceptance, the drawer is immediately advised of this, and put on his guard, both to adopt other measures for withdrawing his effects out of the drawee's hands before the expiry of the three months, and to provide funds for the payment of the bill without trusting to his correspondent. But when the bill is at once protested for non-acceptance and non-payment, at a distance of three months after being drawn, and returned abruptly on the drawer, his effects in the drawee's hands might not only be lost in the mean time, but he might

be taken by surprise, and be at a loss to answer a demand coming from him so suddenly; especially as, from his not hearing, for so long a period, of the bill, he might have had good reason to conclude that it was accepted and paid. Not to mention, that were a bill not presented for acceptance till the day of payment, the drawee, if he had received no advice, might happen to be unprepared for it, and be obliged to suffer it to be dishonoured; whereas, had it been duly presented for acceptance when it came to the payee's hands, and accepted by the drawee, he would thereby have subjected himself to payment, and, in all probability, have provided funds to retire it when due, and thus saved both the honour of the drawer and the costs of protest, commission, re-exchange, &c. By acceptance, a new debtor is added to the drawer, and a new security to the bill, which becomes a more negotiable instrument.[g] And as the drawer may sustain a loss by the holder's keeping it any great length of time, it ought, in all cases, to be presented as soon as possible.[h] It has, however, been de-

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[g] Beawes, p. 491. Scarlett, ch. 10. 1. 32.

[h] Poth. n. 143. Notwithstanding the considerations urged in the text, it is indisputably fixed as law, both in Scotland and England, that bills payable at a fixed time, do not require to be presented to the drawee for acceptance or payment before the last day of grace. Bell's Comm. I. 320, and the cases of Ferguson & Jamieson, note [i]. Bayley, 182. Chitty, 158. There is nothing in the nature of the document from which an obligation to present it sooner can be deduced. By the tenor of the bill, the drawer has agreed to trust to the solvency of the drawee for a certain time, and he can demand nothing more, than that the holder present the bill punctually at the expira-

cided, that a bill payable at a day certain, need not be presented by the *porteur* for acceptance, before the day of payment;[i] and this, accordingly, is laid down as the law at present;[k] though it is evidently at variance with what has been stated and admitted to be the law with regard to bills payable after sight, viz. that they do not require the same rigorous negotiation with bills

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tion of that time; and if payment be then refused, give him due notice, that he may adopt measures for securing his funds. He ought himself to guard against the evils mentioned in the text, by advising the drawee of the expected demand, and putting him in funds to answer it. At the same time, a holder, for his own sake, ought, in all cases, to present the bill for acceptance without delay, on account of the increased security and ease in recovering payment, which an acceptance affords.

Bills payable *at or after sight*, again, are in a different situation. As the drawer's funds must remain in the drawee's hands, exposed to the hazard of his insolvency, till the bill becomes due, a period which is fixed by its presentment for acceptance, the holder is under an implied obligation to present it within a reasonable time; and he must be prepared to shew, that he has been guilty of no undue delay, or that the bill was in circulation in the market. See sup. note [d].

There are exceptions to the rule, that it is not necessary to present for acceptance a bill payable at a time certain, when the payee is expressly desired to present it, and when the bill has been sent to an agent for negotiation, Chitty, 159. Dunlop *v.* Hamilton & Co. 16th Jan. 1810, Fac Coll. Here a bill for L.780, dated on Friday 4th Oct. 1799, drawn by Robertson & Co. of Greenock on Bogle of Glasgow, payable four days after date, was discounted on that day by Dunlop, the Bank of Scotland's agent in Greenock. He sent it next day to Hamilton & Co. the agents in Glasgow, who presented it for acceptance on Tuesday evening, and then only in consequence of a letter from Dunlop. The drawers in the meantime having failed, acceptance was refused, and in an action by the bank against the two agents, Hamilton & Co. were found liable.

[i] 1727, Ferguson *a.* Malcolm, Dict. v. 1. p. 101, Mor. 1558, and Jamieson *v.* Gillespie, 28th June 1749, Mor. 1494 and 1579, where the opinion of merchants was taken.

[k] Ersk. b. 3. t. 2. § 32.

payable on a certain day. As a general rule, therefore, it is always advisable that bills of every description, whether payable after sight or after date, be presented for acceptance within a reasonable time. What is to be deemed a reasonable time, must be determined from a consideration of the situation of the parties, the distance at which they reside, the course of post, and other circumstances. Generally, it may be presumed, that such time only will be allowed as is sufficient to enable the holder conveniently to go and present the bill for acceptance, or to send it for that purpose.[1] But if a bill is sent for acceptance, it ought not to be suffered to lie for any length of time in the drawee's hands, without getting it either accepted or protested for non-acceptance.

Case of Falls *v.* Porterfield.

Porterfield, on the 3d May, transmitted to C. & R. Falls, a bill for L.129, dated 2d May, drawn by Johnston of Glasgow, on Borthwick in Edinburgh, payable, three days after sight, to Porterfield, and by him indorsed to C. & R. Falls, who, on the 7th May, acknowledged receipt of the bill, which they sent to Edinburgh for acceptance. Borthwick happened to be out of town when the bill arrived; but his clerk wrote to Messrs Falls, on the 11th May, that he was soon expected home, when the bill would be presented. On the 16th May, Messrs Falls

[1] Stair, b. 1. t. 11. § 7. L'Art des Lettres de Change, ch. 6. § 6. Forbes, 95.

sent a clerk to Edinburgh, to require that the bill should be either returned or accepted. Borthwick requested that it might be left a few days longer, which was done; but the bill not being returned, Messrs Falls, on the 5th June, again sent a clerk, with instructions either to get the bill accepted or protested. Borthwick delivered the bill to the clerk, with a protest taken against himself on the 31st May, for non-acceptance, and against the drawer and indorser for recourse; and on the 6th June, the clerk took a new protest against the whole parties, for non-acceptance, recourse, &c.; and against Borthwick for damages, on account of his keeping up the bill without accepting it or returning it with a protest for non-acceptance. On the 7th June, intimation of the dishonour was made to Porterfield, who refused payment, on the ground of the bill not being properly negotiated. And the Court found, that from the undue delay in getting the bill accepted or protested, recourse was lost.[m]

Negligence in procuring acceptance.

On the same principle, if a bill be left in the hands of the person drawn upon, without being accepted, till news come of the drawer's insolvency, the loss will fall on the holder, whose duty it was to have looked after his bill, and got it either accepted or protested in due time;[n] unless the insolvency occurred after the bill had

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[m] 1766, Falls *a.* Porterfield, Fac. Coll. No 109, p. 374. Mor. 1593.

[n] Scarlett, ch. 10. R. 17.

been redemanded.[o] If a person receives a bill, and instead of sending it by post for acceptance, keeps it till he himself sets out on a journey to the place where the drawee lives, by which means a delay is created, he loses his recourse upon the drawer or indorser.[p] It is incumbent on the bearer of a bill, when he acts as agent for the proprietor, in all cases to present it for acceptance as soon as possible, as it is only by acceptance that the person on whom the bill is drawn becomes debtor, and responsible to the holder; and if the affairs of the drawer should get deranged, an agent neglecting to present the bill for acceptance, would be liable in damages to his constituent.[q]

When bill lost.

If a bill left for acceptance be lost or mislaid, either by the person on whom it is drawn, or by any of his servants, so that it cannot be returned to him that left it, either accepted or unaccepted, he who lost the bill (if he intended to accept, or had accepted it), should grant a note for payment of the sum in the bill at the expiry of the specified time; and, should this be refused, a protest ought immediately to be taken for non-acceptance, and forwarded to the drawer; and if the contents of the lost bill are not paid or satisfied

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[o] Dupuis, ch. 10. n. 8. Scac. § 2. gl. 5. n. 335.

[p] 1773, Finlason *a.* Ewing, Fac. Coll. No 53, p. 136. Mor. 1597. In this case, the bill was not presented, and notice given of the dishonour, till some days after the term of payment.

[q] Poth. n. 128. Mar. 46. Beawes, 117. See sup. p. 108, note [h].

by the time it becomes due, a protest for non-payment should at any rate be made.[r]

Form of acceptance.

II. Acceptance is either written or verbal. In this country, verbal acceptances are not in use, as summary diligence could neither proceed on such acceptances, nor could they be proved otherwise than by oath of party.[s] But in England, a verbal or parole acceptance, is as obligatory on the drawer as a written one.[t] When the bill is presented for acceptance, the holder is entitled to insist on such acceptance by the drawer, as will subject him, at all events, to payment of the bill according to its tenor;[u] and whether accepted or refused, the bill, as the holder's document of debt against the drawer, must immediately be returned.[v] If the bill be payable after sight, and the drawee detain it some days without declaring his intention to accept, and afterwards incline to do so, the acceptance must be from the date of the first presentment.[w] The accepter has no liberty of adding any stipulation or quality to his acceptance, without the holder's consent; the acceptance must be simple and absolute, unclogged

Conditional and qualified acceptances.

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[r] Beawes, n. 17.

[s] In France, too, the acceptance must be written. "Celui sur qui est tirée une lettre de change doit en faire l'acceptation par ecrit." Ord. de 1673, tit. 5, art. 2.

[t] See p. 119-21.

[u] Stair, b. 1. t. 11. § 7.—Poth. n. 47.

[v] That is, within twenty-four hours.

[w] Scarlett, ch. 10. R. 18.

with any condition.[x] Nor is it safe for the holder to take a conditional or qualified acceptance, without authority from the drawer or last indorser to that effect, and if he does so, it is at his own risk and peril.[y] He may, however, take an acceptance for part of the sum, if he protest the bill for the remainder; it being for the drawer's interest to have his debt diminished.[z] In the same manner, taking acceptance of a bill some days subsequent to the time of payment, and after it had been protested for non-acceptance, was found no wrong step of negotiation.[a] But though a

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[x] 1712, Naughton *a.* Ritchie, Mor. 1490.—1781, Campbell *a.* Campbell, Dict. v. 3. p. 77, Mor. 1478. In this case, two bills were drawn by Campbell of Ballinaby on Campbell of Carnbeg, who, wishing to stipulate certain conditions, sent them accepted to his agent at Greenock, where the drawer and payee were, with instructions to see the conditions fulfilled, before delivery of the bills. They were, however, forced out of his agent's hands by a decree of the Sheriff; and the effect of the conditions was tried in an action for payment by an indorsee from the payee against Carnbeg, and a reduction brought by him of the Sheriff's decree. The Court, in repelling the reasons of reduction, and finding Carnbeg liable in the amount of the bills, seem to have proceeded chiefly on his improper detention of them, instead of returning them at once to the payee, with an acceptance or refusal. See p. 118, note [l].

[y] Savary, tom. 1. liv. 3. ch. 6.—Forbes, p. 98.—Scarlett, ch. 10. R. 29.

[z] Molloy, b. 2. ch. 10. § 20.—Boucher, n. 1048.—Forbes, 99.

[a] 1705, Nov. 14, Brown *a.* Hume, Mor. 1546.—Forbes, p. 99. In this case, the bill was drawn payable at Lammas, (2d Aug.) 1703. On that day, the drawee accepted it payable on 16th August, no notice of which was given to the drawers. Protests for non-payment were taken on 5th and 17th Aug. The Court found that recourse was not lost. This decision is not agreeable to modern practice, which does not allow the holder of a bill to prorogate the term of payment to the accepter, without the consent of the other parties. See ch. viii.

bill may be accepted after the day of payment, so as effectually to bind the accepter, the drawer and indorsers will be discharged, unless due notice of non-acceptance or non-payment be given; and upon such acceptance, the accepter is liable to pay the bill on demand.[b]

Consequence of taking a qualified acceptance.

By the French edict of commerce of 1673, it is declared, that a qualified acceptance may be held as a refusal, so as to entitle the holder to protest the bill.[c] In England, if the holder receives a conditional or qualified acceptance, and gives immediate notice to the other parties of the nature of the acceptance, they continue bound, in case the drawee should not pay.[d] In Scotland, if the holder suffer the acceptance to be qualified; if, for instance, he consent to prolong the day of payment, or to take a conditional acceptance, such as, "if provisions come to hand betwixt and the day;" or, "if goods or bills in hand raise the sum;" it imports his consent, so as to preclude him from protesting for non-acceptance.[e] But by this prolongation of the time of payment, the drawer cannot be affected if he has not given his consent to it; and therefore the holder loses his recourse upon him in the event of the accepter's failure before the bill becomes due.[f]

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[b] Chitty, 169.—Bayley, 140.
[c] Tit. 5. art. 2.
[d] Chitty, 180.—Molloy, b. 2. ch. 10. § 20. See note [f].
[e] Stair, b. 1. t. 11. § 7.
[f] Poth. n. 49.—Boucher, n. 1048.
The following are illustrations of the doctrines contained in the

When drawee creditor of holder, &c.

When the drawee is creditor of him who has given value for and remitted the bill, he may

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text regarding qualified and conditional acceptances:—1. The holder is not *bound* to take any acceptance but what is in the exact terms of the bill. Boehm *v.* Garcias, 1. Camp, 425, where a bill was drawn on Lisbon, "payable in *effective*, and not in *val reals*," and an offer was made to accept, payable in *val denaros*, a different kind of currency. Per Lord Ellenborough,—"The plaintiff had a right to refuse this acceptance. The drawee of a bill has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the same. Therefore, without considering whether a *payment* in *denaros* might have satisfied the term "*effective*," an *acceptance* in *denaros* was not a sufficient acceptance of a bill drawn payable in "*effective*." The drawee ought to have accepted generally, and an action being brought against him on the general acceptance, the question would properly have risen as to the meaning of the term."

2. But it is in the holder's power, if he chooses, to take such qualified acceptance, and on his doing so, he will be bound to observe its terms. Thus, a *conditional* acceptance, to pay a bill on a certain event taking place, is valid, though we have already seen, *supra*, p. 54, *et seq.* that a bill is null, if drawn originally in a conditional form. Chitty, 180, and the cases there cited. Smith *v.* Abbot, Stra. 1152, where a bill had been accepted by defendant, "to pay when goods consigned to him were sold." He sold the goods, and on an objection, that the conditional nature of the acceptance voided the bill, the Court held, that though the plaintiff might have refused to take it, and have protested the bill, yet, as he did take it, it was binding on the defendant. In like manner, the sum in a bill, the place, and time of payment, and the mode of paying, may be varied in the acceptance. Wegerstoffe *v.* Keene, Str. 214. Walker *v.* Atwood, 11 Mod. 190. Petit *v.* Benson, Comb. 452. And if a particular place stated in the acceptance, at which the bill is to be payable, be acquiesced in by the holder, he will free the drawer and previous indorsers, if due presentment there is not made, Parker *v.* Gordon, 7 East. 385. In Petit *v.* Benson, the bill was accepted payable, half in money and half in bills, which was found available, though a bill cannot be originally drawn for any thing but cash.

3. It is necessary that these qualifications of the tenor of the bill be in writing, along with the acceptance, for it is very doubtful if parole evidence would be received to contradict the acceptance; and, at all events, the *onus probandi* would lie on the accepter, and an indorsee would not be affected by such quali-

accept it "to pay to himself," provided the debt is liquid, and either due at the time, or falling due before the bill is payable, so as to be in a state of compensation;[g] nor is this, according to Pothier, to be considered a conditional acceptance, seeing it arises upon a transaction of the holder's own.[h] In the same manner, if a creditor of the holder of the bill has, before it is presented, arrested the funds in the hands of the drawee, he ought, in that case, to accept in these terms, "to pay to whoever shall be found to have best

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fications, unless he was specially made aware of them. Bayley, 155. Bell's Comm. I. 310.

4. When a qualified acceptance is offered, the holder, if he does not intend to acquiesce in it, must take a protest for non-acceptance in the ordinary manner, and give notice to the drawer and indorsers. If he is willing to take it, it appears to be the custom in England, that he must intimate its terms to the other parties, that they may consider whether they will permit his acquiescence in the acceptance. Bayley, 206. And he must also take a qualified protest for non-acceptance, so as neither to injure his recourse, nor relieve the drawee from the effects of the acceptance, should he be allowed to take it. Chitty, 217. If no notice is given of the qualifications, the other parties will be freed: but if a *conditional* acceptance be made absolute by the completion of the conditions, this will do away the effect of a neglect to give notice. An acceptance for part of the sum may, however, be safely taken, provided the bill is protested, and notice given as to the remainder; a neglect will free the other parties only as to the excess above the sum accepted for. Bayley, 206.

5. If after an offer of a qualified acceptance, the holder gives notice to any of the antecedent parties that he has refused it, or notes the bill generally for non-acceptance, the offer is no longer binding. Bayley, 158.

We have already seen, that an acceptance as "cautioner," is not a condition which is of any service to the person so subscribing, in a question with the holder of the bill, *sup.* p. 59.

[g] Boucher, n. 1387.

[h] N. 47.—Dupuis de la Serra, ch. 8.

right to the contents."[i] The drawee ought not to accept bills after he is aware of the drawer's failure, even though he possesses funds; because, after that event, one creditor of the drawer ought not to be paid in preference to another.[k] Any person having accepted a bill, either absolutely or conditionally, may score out his acceptance before the bill be out of his hands, but not after having delivered it to the payee.[l]

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[i] Boucher, n. 1045.—Poth. n. 47.—Dupuis, ch. 10.

[k] Scac. § 2. gl. 5. n. 390.—Beawes, n. 139.—Poth. n. 96.

[l] Sav. tom. 1. liv. 2. ch. 5.—Boucher, n. 1041.—Dupuis, ch. 10. n. 6, 7. It was maintained for the holder in the case of Campbell *v.* Campbell, *sup. p.* 114, note [x], that Carnbeg having once accepted the bills simply, could not afterwards stipulate any conditions with the other parties, or cancel his acceptance, even though the bills remained in the possession of his own agent. This doctrine, which binds the drawee by an acceptance which he has not finally consented to, and disregards the plain justice and *bona fides* of the case, is not reconcileable with any legal principle; and though at one time it was adopted by the English courts (Chitty, 186, and the cases there cited), yet in the last case that has occurred, (after a doubt had been previously thrown out by Lawrence, J. in Bentinck *v.* Dorrien, 6 East, 200), the Court of King's Bench were clear in departing from the former decisions, and decided that an acceptance might be cancelled at any time before delivery by the drawee, Cox *v.* Troy, 5 B & A, 474. And the point is now to be held as settled in this way, Bayley, 162. Bell's Com. I. 310. Pothier's opinion is to the same effect. After detailing a case of this kind, he observes, "La raison est, que le concours de volontés qui forme un contrat, est un concours de volontés que les parties se sont reciproquement declarées; sans cela, la volonté d' un partie ne peut acquérir de droit a l' autre partie, ni par consequent etre irrevocable. Suivant ces principes, pour que le contrat entre le propriétaire de la lettre et celui sur qui elle est tirée, soit parfait, il ne suffit pas que celui-ci ait en pendant quelque temp la volonté d' accepter la lettre, et qu'il ait écrit au bas qu'il l'acceptoit; tant qu'il n'a pas declaré cette volonté au porteur, le contrat n' est pas parfait; il peut changer de volonté, et rayer son acceptation." Traité du Contrat de Change, part I. ch. 3. § 3. pl. 44.

The usual way of accepting a bill is, by writing thereon the word "accepted," or "accepts," and subscribing the drawee's name; or the name only is subscribed: and if the accepter be afraid of any alteration being made in the sum, he ought to write, "accepted for the sum of so much."[m] When a bill is payable after sight, the day on which it is accepted ought to be specified, because the time of payment is ascertained by the date of the acceptance. Bills payable at sight, or on demand, require no acceptance, and need only be presented for payment, and, if refused, protested; there being no days of grace on such bill.[n] In England, however, a bill payable at sight has the usual days of grace;[o] and a bill payable at sight is not there considered as a bill payable on demand, or included under the ex-

Form of acceptance.

When date of acceptance necessary.

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[m] Boucher, n. 1017. It has been adjudged in England, that when a bill is made payable in a large town generally, the holder is entitled to require that the drawee, in his acceptance, state a particular place at which it is to be payable. Mutford *v.* Walcot, Lord Raym. 575, per Holt, C. J.

[n] Sav. tom. 1. liv. 3. ch. 5.—Scarlett, ch. 16. R. 8. There have been no decisions in Scotland on this point, and though it is understood that in mercantile practice the rule laid down in the text is acted upon, it is not to be considered as settled, that bills payable *at sight* have no days of grace. Beawes, pl. 256, and Kyd, 10, lay down the law in the negative, and Pothier, pl. 12, 172. 198. is also of that opinion. On the other hand, in various decisions, in which the point occurred in England, the affirmative has been held, Chitty, 269. In Janson *v.* Thomas, B. R. Trin. 24 Geo. III., Buller, J. mentioned a case before Willis, C. J., in London, in which a jury of merchants was of opinion that the usual days of grace were to be allowed on bills payable at sight. Bayley, in his Treatise, p. 198, accordingly states the law to be so. Forbes, 142, is of the same opinion. Mr Bell, I. 322, considers the point unsettled.

[o] Bayley, 198.

ception of the stamp act of 23. Geo. III. c. 49. § 4. in favour of such bills. A bill on demand is payable instantly.[p]

Acceptance by a company.

When a bill is accepted by a partner of a copartnery, on the company account, he subscribes the common firm of the copartnery, or expresses that it is for self and partners, or for self and company.[q]

Two persons in copartnery having commissioned goods from a factor abroad, and advised him by letter to draw bills for the same, and they would honour them; which he having done, one of the partners accepted in the ordinary way, and the other accepted for his own part; it was found that the latter was liable for the whole.[r]

Joint acceptance.

If a bill be addressed to several persons jointly, who are not in copartnery, it may be protested

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[p] Manning, p. 8.—Chitty, 269.

[q] In Mason *v.* Rumsey, 1 Camp. 384, it appeared that a bill was drawn on "Messrs Rumsey & Co.;" and T. Rumsey, jun. wrote on the back of it, "accepted, T. Rumsey, sen." T. Rumsey, jun. defended an action brought against him on this bill, on the ground, that even if he were a partner, which he denied, the above form of acceptance would not bind him. Per Lord Ellenborough—"There is no foundation for the doctrine contended for; this acceptance does not prove the partnership; but if the defendants were partners, they are both bound by it. For this purpose, it would have been enough if the word "accepted" had been written on the bill; and the effect cannot be altered by adding, "T. Rumsey, sen." If a bill of exchange is drawn upon a firm, and accepted by one of the partners, he must be understood to exercise his power to bind his co-partners, and to accept the bill according to the terms in which it is drawn." Verdict for plaintiff, and a motion for a new trial, on the ground of the evidence of partnership having been insufficient, was afterwards refused by the court.

[r] Naughton *a.* Ritchie, Dict. v. I. p. 98. Mor. 1990. See *sup. p.* 49.

for non-acceptance if any one refuse, although the rest accept.[s] And where the acceptance is by a factor or procurator, it is necessary to specify that he acts *per* procuration, or in quality of factor, otherwise he will be personally bound.[t] If the drawee be not capacitated to accept, and to bind himself to pay the amount of the bill, it may be treated as dishonoured.

Per procuration.

A promise to accept, as "leave your bill with me, and I will accept it," or "call for it to-morrow, and it shall be accepted," is said to amount to a verbal acceptance.[u] The word "seen" written on the bill, is also said to be equivalent to an acceptance.[v] And in England, writing the words "accepted," "presented," the day of the month, or a direction to a third person to pay the bill, will amount to an acceptance on the part of the drawee.[w]

Form of acceptance in England.

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[s] Molloy, b. 2. c. 10. § 18.—Mar. 64.—Beawes, 228. Chitty, 39.

[t] Ch. II. p. 46. When acceptance *per procuration* is offered, the holder should insist on seeing the procuration, for otherwise he is not bound to take the acceptance; and if the authority should prove insufficient, he might free the other parties. Bell's Comm. I. 311.

[u] Molloy, b. 2. ch. 10. § 20.—Chitty, 176.

[v] Poth. n. 45.

[w] Bayley, 141. Chitty, 174. A *written* promise to accept a bill already drawn, is also held in England to be a valid acceptance, Chitty, 176; but it is considered doubtful, whether a letter promising to accept a bill not yet drawn can be founded upon as an acceptance by any person but him to whom it was addressed, and who took the bill on the faith of it. Chitty, 168. Bayley, 144. Johnson *v.* Collins, 1 East, 98.

The English judges have frequently regretted the degree of looseness in the modes of acceptance which the decisions had sanctioned, though they admitted that practice had gone too far to allow of their changing it. 1 East, 103, and 4 East, 67. To remedy the evil so far as regards *inland* bills, it is enacted by

Implied acceptance.

Acceptance is also sometimes implied; as when the drawee keeps up the bill after the same is redemanded.[x] But according to the English de-

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1 and 2 Geo. IV. ch. 78. s. 2. "that after 1st August 1821, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill; or if there be more than one part of such bill, on one of the said parts." The former rules, however, still apply to foreign bills.

In Scotland, a proper acceptance cannot be made except by subscription upon the bill itself; and summary diligence is not competent against a drawee, unless acceptance is so made. But if one promises by letter to accept a particular bill, there can be no doubt he would be found liable for the amount of it in an action by the payee, or any other person, who took the bill *bona fide* on the faith of the letter. Frazer's trustee *v.* Campbells, Frazer & Co. 28th May 1823, Shaw's Rep. II. 346. The claim, however, in such a case cannot, correctly speaking, be founded on an acceptance of the bill, but on the letter, as an obligation or letter of credit to the amount of the sum in the bill. The holder would also be held to have a preferable right to the fund in the hand f the drawee. Bell's Comm. I. 309.

A *verbal* acceptance is not recognised in Scotland. But as an intimated assignation, Mr Bell considers that it would have the effect of transferring the fund in the hand of the person drawn upon. Comm. *ibid.* It was so decided in Fairholm *v.* Gordon, 1st Feb. 1724, Mor. 1462.

[x] Dupuis, ch. 10. n. 8, 9.—Poth. n. 46. But it must appear, that the delay in returning the bill has been unreasonable, after the holder had redemanded it. And the drawee may justify himself, by reference to the previous course of dealing between him and the holder, Bayley, 151. Mason *v.* Barff, 2 B. & A. 26. See Campbell *v.* Campbell, *sup.* p. 114, note [x].

*Destruction* of the bill by the drawee may also make him liable for its amount. But a drawee was held not liable on account of having destroyed the bill, where he had previously refused acceptance, and the holder had left the bill in his hands. Jeune *v.* Ward, 2 Stark. 236.

"Constructive acceptances ought to be watched with the utmost care, for when a party puts his name on a bill, he knows what he does, and that he thereby enters into a contract; but it is laying down a very loose and dangerous rule, when any latitude is given to these cases of constructive acceptances. The cases which have been determined in favour of these constructive acceptances have all been decided upon very special circumstances." Mason *v.* Barff, *sup.*

cisions, in order to constitute an acceptance by implication, there must be some circumstance, from whence it may be inferred that the drawee imagined he had induced the holder to consider the bill as accepted; and therefore, an answer given by the drawee, "there is your bill, it is all right;" or the answer of a merchant to the drawer, that he would "duly honour his bill," will not, unless accompanied with circumstances that may induce a third party to take the bill by indorsement, be construed into an acceptance.[y]

Liability of an accepter.

III. The effect of acceptance is, to give credit to the bill, and to render the accepter liable according to the tenor of his acceptance; and the very act of accepting, implies an acknowledgment that he has effects of the drawer in his hands. At least this presumption is good with regard to the holder, who is not obliged to inquire whether the drawee were the drawer's debtor at the time or not.[z] By the acceptance,

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[y] Kyd, 74.—Chitty, 177. For the same reason, an express refusal to accept, written on a bill, which, it has been said, constitutes an acceptance, has not this effect, unless the drawee intended it as a surprise upon the party, and to make him consider it as an acceptance. Bayley, 142. Note (26.)

And where a drawer advised a drawee of a bill for L.100, and added, "which please to honour," and the drawee answered, "your bill *shall have attention*," this was not held equivalent to an acceptance, as the answer was ambiguous. Rees *v.* Warwick, 2 B. & A. 113.

[z] The words "value received," in a bill to which there are three parties, are understood to refer to value between the drawer and payee, and not between the drawer and accepter.

the drawee constitutes himself debtor to the payee, and to all the indorsers, who are thereby entitled to demand and exact payment from him.[a] When the bill is once accepted absolutely,[b] it cannot in any case be revoked; and the accepter is in all events bound, though he were to hear the next moment of the drawer's bankruptcy, and though the failure was before the acceptance.[c] But if the drawee was not possessed of effects of the drawer at the time of acceptance, and was induced to accept by any mistatement or fraud on the part of the holder, this is a sufficient ground for refusing payment of the bill when due. It is a fraud on the part of the holder, when, being in the knowledge of the drawer's bankruptcy, he conceals this circumstance from the drawee, in order that the bill may be accepted. And, according to Pothier, if the accepter can prove that the holder, when he presented the bill, was in the knowledge of

When fraudulently induced to accept.

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Grant *v.* Da Costa, 3 Maule & Sel. 351. Per Bayley, J.—"the object of inserting the words "value received," is to show that it is not an accommodation-bill, but made on a valuable consideration given for it by the payee." But it is also the general opinion, that an acceptance presumes *in dubio* that the accepter has funds of the drawer. Tait on Evidence, 477. It is so established in the English law, Chitty, 410. Erskine, however, is of a different opinion, which is supported by the decision of Cunningham *v.* Agnew, 4th July 1711, Mor. 1531. "Value in account" does not presume value in the accepter's hands. *Sup.* p. 94.

[a] Boucher, p. 223.

[b] It must also have been returned to the holder. See p. 188.

[c] Poth. n. 118. 120.—Beawes, n. 23.—Molloy, b. 2. c. 10. § 28.

the approaching failure of the drawer, he is entitled to be restored against the acceptance. If any extraordinary means have been used in procuring acceptance, such as sending a bill by express to get it accepted, and the drawer's bankruptcy ensuing immediately afterwards, a presumption of fraud is afforded, sufficient to entitle the accepter to insist on the acceptance being annulled.[d]

Drawee not entitled to decline acceptance till day of payment.

When a bill payable after date is presented for acceptance, the drawee will not be allowed to deliberate whether he will accept or not till the bill fall due, upon the pretence of his not being at the time in funds for the drawer, but that he expects to be so before the bill is payable, and will then determine either to accept or refuse. If immediate acceptance be not made, the bill

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[d] Poth. n. 118. The proof of knowledge on the part of the holder, of the drawee's approaching bankruptcy, must depend on the particular circumstances of each case.

The accepter of a bill urged, in a suspension, that he had been fraudulently induced to put his name to it without full value, and insisted for a judicial examination of the holder, in which, if he should advance what was not true, the suspender would have an opportunity of disproving it, and so to invalidate his claim. It was observed on the Bench, that where circumstances of fraud are relevantly stated against the holder of a bill of exchange, and a proof offered, such previous examination as was here required might be highly expedient, both for superseding the necessity of further evidence, and for the better investigation of the truth. But to allow that method of proceeding, in consequence of general allegations like the present, would tend, in a great measure, to obstruct that free currency of bills of exchange which is so essential to trade. The Lord Ordinary refused the bill of suspension; which judgment the Court affirmed, after advising a reclaiming petition for the suspender, with answers.—1785, Fac. Coll, No 227, p. 353, Goodfellow *a.* Madder. Mor. 1483.

must be protested for non-acceptance;[e] as it is but reasonable that the holder should have it ascertained upon whom he is to rely for his money. It is usual, however, to retain the bill till the period of payment, and to transmit the protest only, with advice to the drawer; and sometimes both bill and protest are kept till the former falls due.[f]

Obligation on a debtor to accept a bill.

A question naturally occurs here, whether a person, who is debtor to the drawer, is in all cases bound to accept the bills drawn upon him, to the extent of the debt he owes. Where a banker, or any other person, has received funds of the drawer, for the purpose of enabling the latter to draw upon him, there is evidently a tacit or expressed contract, by which the former is bound to accept and pay the drawer's bills, till the funds in his hands be exhausted. In the same manner, when the drawer writes to inquire whether or not the person he means to draw upon will accept his bills, and receives an answer that they will be accepted, the drawee, in the case of a subsequent refusal to accept, is liable to the drawer for the loss and costs thereby occasioned.[g] But besides this, it is the opinion of most mercantile people, that a merchant, who is creditor of another merchant in a liquid sum arising from commercial dealings, has a right, without any express consent of the debtor, to draw a bill

[e] Savary, tom. 1. liv. 3. ch. 5.
[f] Forbes, p. 97.—Sav. *ibid.*
[g] Scarlett, Style of Exch. ch. 7. R. 25.—ch. 11. R. 37.

of exchange upon him for the amount; and that, if he dishonour the bill, he is liable in damages, costs, re-exchange, &c. to the drawer, just as if he had agreed to the draft. Upon the common principles of law, no man can be made a mandatory without his own consent; and a creditor can only recover from his debtor by an ordinary action. It seems unreasonable, therefore, to suppose that the debtor should be subjected to a large expense, arising from a presumed obligation to which he has never given his consent. When I purchase a bale of broad cloth from a merchant of Leeds, or a box of muslins from a manufacturer of Manchester, I am liable for the price, after the expiry of the ordinary or stipulated period of credit; but I am not obliged to accept of bills drawn upon me for the price, without notice, and at random periods of payment. The general policy of merchants is to keep as small a portion as possible of their capital unemployed, or in an unprofitable state. Their funds, therefore, have usually a fixed and destined application relative to the bills which they know of, and have already upon the circle; and any unforeseen demand, or unexpected draft of which they have not been advised, and for which they have made no provision, must consequently derange their plans, and frequently expose such bills to the risk of being protested, and sent back dishonoured. The expenses incurred upon this transaction ought, one would think, to be borne

by the creditor who rashly and unadvisedly drew the bill, and not by the debtor, who had received no intimation to prepare him for such an event. Many merchants, however, entertain a different idea on the subject; though it certainly appears to be inconsistent both with sound principles of law and with reason, that a bill should be abruptly drawn on a debtor, without his previous knowledge or consent, even in commercial matters. As this is a point of mercantile law, it must no doubt be regulated by the general usage; but though the practice may be admitted in regard to foreign bills, and in cases strictly commercial, there seems to be no adequate cause for allowing it in cases that are not commercial. It is laid down, in general, by one of our great institutional writers, that if a drawee refuse to accept, while he is possessed of the drawer's effects, he is liable in all the damages which the drawer shall suffer by that refusal; because the drawee was debtor to the drawer previously to the draft;[h] which doctrine, it is conceived, ought to be received with some modification. It is sufficiently established, that when a bill is drawn upon a person who is indebted to the drawer, or has effects belonging to him in his hands, he cannot afterwards pay to the drawer, whether he has accepted the bill or not.[i]

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[h] Ersk. b. 3. t. 2. § 29.

[i] 1712, Gordon *a.* Anderson, Dict. v. 1. p. 97. Mor. 1490. Boucher, n. 1098.

IV. If the drawee of a bill declines accepting, but wishes to prevent the return of the bill, and the expenses that this will occasion, he may accept for the honour of the drawer or indorser, which is called an acceptance *supra* protest;[k] or, in case of the drawee's refusing to accept in this way, any other person may do so.[l] When a bill is to be accepted *supra* protest, the accepter must appear before a notary, and declare that he accepts such bill in honour of the drawer or indorsers, and that he will retire it when due; and must subscribe the bill thus, "accepted *supra* protest, in honour of A. B.;" or, more briefly, "accepted S. P.;" by which acceptance he is effectually bound to the holder; and a notorial instrument is made out, narrating the cause and nature of the acceptance. This instrument is essentially necessary in all cases of acceptance *supra* protest; for otherwise, an accepter might easily,

Acceptance *supra* protest.

Form.

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[k] Molloy, § 29. 33. Poth. n. 25. Acceptance in this manner has the effect of taking away the presumption, that the drawee is possessed of funds of the drawer.

[l] Successive acceptances by different persons, for the honour of separate parties on the bill, may be made. Forbes, 105. Chitty, 241. And another acceptance, *supra* protest, may, in England, be made in addition to that of the original accepter, when he has become bankrupt, or has absconded, and a protest for better security has been taken, (as to which protest see Ch. VII.) Bayley, 136. 139.

[m] Parf. Neg. tom. 2. ch. 9. § 5. Beawes, n. 107, 108. Mar. p. 87. Scarlett, ch. 12. A general acceptance, *supra* protest, is construed to be for the honour of the drawer, Chitty, 242. An acceptance *supra* protest renders the accepter liable to the holder, and to all the parties who have a claim against the person for whose honour the acceptance has been made, in the same manner as if the acceptance had been general, *ib.*

after retiring the bill, make his acceptance a qualified one, by adding the words, "accepted S. P. for the honour of the drawer and indorser," if he wished, at any future period, to claim relief.[n]

Previous protest for non-acceptance.

Before a bill is accepted in this manner, it is requisite that it be protested by the holder against the drawee for non-acceptance;[o] and notification thereof given to the drawer.[p]

Notice.

When the acceptance *supra* protest is by the drawee himself, he must by the first post advise the person, for whose honour he has accepted, of the quality of the acceptance, and send this protest and instrument of acceptance to him, that he may take the necessary measures against the drawer or prior indorsers.[q] When the acceptance is by a third party for the honour of the bill or of the drawer, it is incumbent on him to give a similar intimation to the drawer, that he may be enabled to adopt the proper steps against the drawee. The possessor of a bill cannot, it is said, refuse receiving acceptance *supra* protest from any responsible person, unless he have orders not to admit of such acceptance; in as much as a simple acceptance, and an acceptance *supra* protest, are the

Obligation to take such an acceptance.

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[n] 1703, Carstairs *a.* Paton, Dict. v. 1. p. 99. Mor. 1528. See a form of the protest in the App.

[o] Poth. n. 114. Molloy, § 28.

[p] Scarlett, ch. 7. R. 16. Forbes, p. 102. It seems reasonable, that notice should be sent to the whole parties in the usual way, when acceptance *supra* protest is made by a stranger; and to the whole, except those against whom the accepter will have no claim, when made by the drawee.

[q] Beawes, n. 108. Parf. Neg. ch. 9. Max. 3. Scarlett, ch. 12. R. 4. Chitty, 242.

same to him, since they alike bind the accepter to pay, without affecting the *porteur's* recourse against the drawer and indorsers, if payment be not made when the bill falls due; and as the accepter is bound to pay all charges.[r] It is doubtful, however, whether the holder is obliged to acquiesce in such acceptance; and, in England, it has been decided that he is not.[s]

The accessary obligations upon the other parties, arising from the acceptance *supra* protest, will be treated of in the sequel.

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[r] Beawes, n. 27. Scac. § 2. gl. 5. n. 390. Scarlett, ch. 12. R. 6.

[s] Chitty, 242.

# CHAP. V.

## OF INDORSATION.

Modes of indorsation,

THE utility of bills consists, in a great measure, in the ease and despatch with which they may be transferred from one person to another by indorsation, so called from its being generally written on the back of the bill.[a] An indorsation is made, either by the indorser's writing and subscribing an order to pay the contents of the bill to some particular person mentioned by name, which is styled a full indorsement, or by merely signing his name on the bill, and delivering it to the indorsee, or person to whom it is indorsed, which is termed a blank indorsation; and both equally vest a right in the indorsee to demand payment of the bill from the accepter. Blank indorsations are more frequent than full ones, because, if every indorsement was in full, the back of the bill would soon be filled up, and its negotiability thereby circumscribed; and there would be no room for receipts for partial pay-

full, or

blank.

[a] Though an indorsation ought properly to be written on the back of the bill, it will be valid if written on the face. Chitty, 132.

ments, &c. But as a blank indorsation gives a full right to demand payment of the contents, it would perhaps be prudent in the indorser to fill it up as soon as possible, in order to avoid the risk he may run in the event of the bill being lost, and getting into the hands of a *bona fide* holder.[b]

*When* indorsation may be made.

Bills are generally transferred by indorsation, after acceptance, and before the period of payment; but they may also be indorsed before acceptance, or after they are due. It would appear, too, that bills may be indorsed away even after being protested,[c] though, certainly, no transference in this way can take place after registration of the protest;[d] and to allow protested bills to

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[b] Beawes, n. 178. MacDowall's Inst. B. 1. T. 13. § 18. In France, not only blank indorsations are null, but all indorsations must be dated; and antedating is prohibited under the penalty of being prosecuted for fraud. Ord. of 1673, art. 23. 26. The rigour of the law, with regard to blank indorsations, is now, however, somewhat relaxed. Boucher, Inst. Com. 1029.—A.

The indorsement of bills or promissory-notes for sums under L.5 must, by 17 Geo. III. c. 30. § 1, made perpetual by 27 Geo. III. c. 16, specify the name and place of abode of the indorsee, and be attested by one subscribing witness; and bear date at or before the time of making the indorsement. The power of indorsement of such bills or notes is also taken away after the day of payment. But this is an English act not applicable to Scotland.

[c] 1787, MacAdam *a.* MacWilliam, Fac. Col. No. 334. p. 514. Mor. 1613.

[d] Ersk. b. 3. t. 2. § 31.—There is a case collected by Edgar, p. 52, where a bill was indorsed for value, after registration of the protest, and the indorsee pursued the indorsers for recourse, which the Court refused, not upon this ground, but because the indorsee failed in due negotiation. 1724, MacLeod *a.* Gordon, Mor. 1558.—In the Dictionary the date is erroneously stated to be 1764.—A.

It has been frequently decided, that bills pass by indorsation

Effect of indorsation of a bill past due.

pass by indorsation, might, in many cases, lead to very improper and unjust transactions. A drawer, or indorser, cannot, in the character of indorsee, maintain an action against the accepter, where the indorsement is after the refusal of payment; because, when a bill is returned unpaid, either on the drawer or indorsers, its negotiability is at an end.[e] In an action, by the indorsee

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at any time within six years after the day of payment. Robertson *v.* M'Glashan, 6th Feb. 1787, Mor. 11,129, where the bill was five years past due when indorsed.—Elliot *v.* M'Kay, 16th July 1777, Mor. 1648, and App. to bill, No 4, where it was 18 months.—Crawford *v.* Robertson's trustees, 30th June 1814, Fac. Coll., where it was upwards of two years. Erskine's opinion, which is adopted in the text, that bills are not indorsable after registration of the protest, has not been followed by the Court. Freer *v.* Richardson & Co. 18th Nov. 1806, Mor. App. to Bill of Exchange, No 19.—In this case, Duncan and Gordon were joint accepters of a bill to Jean Duncan. It bore date 17th April 1801, and was payable one month after date. On 5th June, it was protested for non-payment, and the protest recorded the same day. On 12th June, an arrestment was used in Gordon's hands, by Freer, a creditor of the drawer, who subsequently indorsed the bill for value to Richardson & Co. In a competition, the indorsees argued, that a bill is indorsable as well before as after protest; and besides, that there were no marks on the bill, from which they could have discovered that it had been dishonoured. The Court preferred them to the fund *in medio.*

But the indorsation will not convey right to the protest, or to any diligence that may have been raised on the bill. Bell's Com. I. 315, note [3], and II. 24, note [1]; where it is stated, that this opinion was delivered by the Court in Freer's case. These must be transferred by assignation.

It has also been long settled in England, that a past due bill may be validly indorsed. Mutford *v.* Walcot, 1 Raym. 575. Holt, C. J. said he remembered a case where a bill was negotiated after the term of payment, and he had all the eminent merchants in London with him at his chambers, and they all held it to be very common and usual, and a very good practice. Chitty, 126.

[e] Kyd, p. 194. This is erroneous. See post. p. 153, note [c].

of a promissory-note against the granter, where the note appeared to have been noted for non-payment, and indorsed afterwards, the granter was admitted to show that the note was paid, as between him and the payee, from whom the indorsee received it.[f]

Delivery not necessary.

The right to a bill is sufficiently transmitted by the indorsement, whether delivery has been made or not; and the indorsee may claim it though found among the effects of the indorser at the time of his death.[g] To make a bill indorsable, it is not necessary that it contain the words "to order."[h] An indorsement to pay to the order of a person, is the same in effect as an indorsement to pay to that person or order, and he may pursue on such indorsation in his own name; but no effectual indorsation can be made, except by the owner of the bill or his agent. An indorsation of a bill, by a person of the same name with the person entitled to transfer it, was found of no effect, (except against the person indorsing it, and subsequent indorsers), though he who had the right to indorse was not particularly described in the bill.[i]

By whom indorsation may be made.

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[f] Kyd, p. 284, 195. See as to the liability of an indorsee to a past due bill or note to the objections pleadable against the indorser, post. p. 148, note [k].

[g] 1787, Carrick *a.* Kay, Dict. v. 4. p. 414.—Mor. 17,009.—Chitty, 140.—But it would appear, that an attachment of the bill by an extent for a crown debt against the indorser, will be preferable to the indorsee, unless delivery has taken place. The King *v.* Lambton and others, 5 Price, 428.

[h] 1726, Crichton *a.* Gibson, Dict. v. 1. p. 96.—Mor. 1446.—Ersk. b. 3. t. 2. § 28.

[i] Bayley, 110. Chitty, 111.

When a bill is indorsed after the term of payment, it is payable on demand; and it is only necessary for the holder to present it for payment as a letter of credit; and, if payment be refused, to notify the refusal to the indorser within a reasonable time.[k]

Indorsations presumed for value.

Indorsations are presumed to be for value, whether value received be expressed or not, unless the contrary be proved by the writ or oath of party;[l] and hence, if the indorsee cannot make good his payment from the accepter, he has recourse not only against the drawer, but against the indorser for the recovery of that value; and if there be several indorsers, he may insist for relief against any one of them. An indorser, however, is freed from any claim of recourse, if he subjoins to his indorsation the words *without recourse*.[m] Scoring the indorsation reinvests the

Effect of scoring an indorsation.

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[k] 1749, Forbes *a.* Young, Kilker. No 22. p. 87. Mor. 1635. See Ch. VIII.

[l] 1715, Auchinleck *a.* Miller, Dict. vol. I. p. 99, Mor. 1537. See p. 77, note [x]. It is not necessary that value have been paid by the indorsee at the time of indorsation. In the common case of a person putting his name as indorser on a bill, to enable the drawer to get it discounted; if the indorser is obliged to pay the bill, this gives him all the privileges of an onerous indorsee, in a question with the other parties. Kidston *v.* Stead and Son, 21st Jan 1809, Fac. Coll. Chitty 80. The want of value cannot be pleaded, if the holder, or any intermediate party between him and the defendant, took the bill or note *bona fide*, and upon a valid consideration, Bayley, 397.

[m] Ersk. b. 3. t. 2. § 28. Agents, and others acting in limited characters, which do not require that they should bind themselves personally, ought to indorse in this manner, or, at least, they should specify the character in which they act. See *sup.* p. 46.

If a person, in payment of a *debt*, give his creditor a bill blank

indorser in the same rights that he possessed previous to passing the bill. An indorsee, after having protested a bill against the drawer and others concerned, for non-payment, returned it to the indorser with his indorsation scored, and he, again, indorsed it to other indorsees, who gave in the protest to be registered in their name for execution; it was found that the indorser was reinvested by the first indorsation having been scored, and the protest was allowed to be registered.[n]

Date of indorsation.

Indorsations of bills of exchange are more privileged than bills themselves; date and place are ordinary requisites of bills, but indorsations and receipts on bills are sustained without being dated. When an indorsation is not dated, the legal presumption is, that it is of the date of the bill;[o] and if it be dated, it is to be held as of that date till the contrary be proved.[p] After indorsation, the bill carries a right to the sums

Indorsee not liable to objections pleadable against indorsers.

indorsed, on which his own name does not appear, he will be understood to guarantee its payment, unless the creditor expressly take the risk on himself, or free some of the parties, by neglect of due negotiation. It is different in the case of the discount or purchase of such a bill, for if the buyer does not require the seller to indorse it, this is evidence of his being satisfied with it as it stands. Ex parte Blackburne, 10 Vesey, 204. Chitty, 143. The statement at p. 45, *sup.* must be received under the above qualification.

[n] 1752, Fairholms, Kilker. No 28. p. 91. Dict. v. 3. p. 77. Mor. 1474. Though the last indorsation be full, a holder has it in his power to strike it out, and avail himself of a previous indorsation which has remained blank. Chitty, 135.

[o] 1709, Rossie *a.* Ogilvie, Forbes, Dec. p. 347.—Mor. 1501. 1712, Smith *a.* Home, Dalrymple, No 93. p. 130.—Mor. 1502.

[p] 1794, Thistle Bank *a.* Leny, Bell's Collection of Cases for 1794.

contained in it, free from all burdens and exceptions but those that are marked on the bill itself.[q] No receipt or discharge, therefore, by the payee or original creditor, written on a paper apart, can secure the accepter from paying a second time to the indorsee, though the indorsation should be posterior to the receipt or discharge.[r] And although a bill should have been granted without value, or though the accepter should have a good ground of compensation or set-off against the drawer, had the bill continued in his hands,[s] it is of no avail against the indorsee, whose right cannot be affected otherwise than by what appears on the face of the bill itself. But if the accepter shall prove by the indorsee's oath, either that the bill was indorsed to him for the indorser's own behoof, or that he (the indorsee) paid no value for it, the indorsation is justly accounted as but a name; and the common rule, which holds in other obligations, applies, sustaining all exceptions against the indorsee that are pleadable against the cedent or original creditor.[t]

Oath must be special.

The oath of the indorsee, with regard to the value he gave, must be special. J. Swan having made a reference to the oath of S. Swan, with

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[q] Smith *a.* Home, *ut supra.*

[r] 1714, Fairholm *a* Cockburn, Dict. v. 1. p. 98. Mor. 1506.—1778, Burnet *a.* Ritchie, Dict. v. 3. p. 82. Mor. 1519.

[s] 1740, Neilson *a.* Bruce, Mor. 9504. 1741, Clark *a.* Stewart, Dict. v. 3. p. 81, Mor. 9510. These cases related to gaming-debts, as to which, see *post.* p. 141-3, note [y].

[t] Ersk. b. 3. t. 2. § 31.

respect to the onerosity of an indorsation of a bill, the latter deponed, in general, "that he paid value for the indorsation, and was an onerous indorsee." But being requested to mention particularly what the value was, he refused to give any more special answer. During an action which depended on that point, between S. Swan and J. Swan, the former died; and afterwards, his heir having been made a party, the Lord Ordinary sustained the oath as a sufficient proof of onerosity; but the Court altered that judgment, and found that S. Swan was not entitled to the privilege of an onerous indorsee.[u]

When indorsee liable to objections.

If the indorsation has been fraudulently devised between the drawer and indorsee, to preclude the accepter's defence, a proof of the circumstance will be allowed; for though bills, when in the possession of fair and onerous indorsees, are, like bags of money, liable to no exceptions arising from the fraud of anterior holders, yet a collusive transference ought not to be attended with the same privileges.[v] It is also

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[u] 1780, Swan *a.* Swan, Fac. Col. No 286, p. 441. Mor. 9418. See also Fulton *a.* Johnston, Dict. 1. 105. Mor. 8446.

[v] 1785, Corrie *a.* Aiken, &c. Dict. v. 3. p. 81. Mor. 1520. Non-onerosity or collusion must be proved against an indorsee, by his *writ* or *oath*, though a proof of facts appears to have been allowed in this case. See Wight *v.* Ritchies, 24th June 1809. Fac. Coll. Craig *v.* Shiells & Co., 15th Dec. 1809, *ib.* Scott Pet., 19th Dec. 1809, *ib.*, where it was expressly so held. In Craig's case, in which the pleas were, that the consideration of the bill was illegal, that this was known to the chargers, and that the indorsation was not onerous, it is stated, that "the Judges concurred in observing, that the objection arising from the consideration for which the bill was granted, did not con-

sufficient to plead against an onerous indorsee, that the bill was originally obtained by violence,

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stitute a *vitium reale* inherent in the bill, and affecting onerous holders; that, therefore, it could not be admitted to proof, *prout de jure;* and the other allegations, as they were only directed against the *bona fides* and onerosity of the indorsation, were not competent, unless offered to be proved by writ or oath of party."

In Arrol *v.* Marshall, 14th June 1821, Fac. Coll., where bills had been granted by a bankrupt to one of his creditors, to induce him to agree to a composition, one of which bills had been indorsed over to Marshall, in circumstances which raised a strong suspicion that he was aware of its nature, the Lord Ordinary refused a bill of suspension for the bankrupt. The Court, after first having passed the bill, on a reclaiming petition, "were satisfied that their judgment had been wrong; and that although there were here very strong grounds of suspicion, the only redress the suspender had, was by writ or oath of the indorsee. It was impossible to allow a proof at large." See also Dennistoun & Co. *v.* Thomson, 2d Feb. 1822, Shaw's Rep. I. 289. Tait on Evidence, 480.

Though the general rule acted upon by the Court, is thus to repel all objections to the onerosity or *bona fides* of indorsees, unless proved by writ or oath, it appears, that in a strong and peculiar case lately decided, a proof at large was allowed. Pentland & Son *v.* Bell & Co., 23d May 1822, Shaw's Rep. I. 426. II. 144, in which it was objected to an action for payment of four bills, that they had been accepted for the accommodation of the pursuers. The Court having remitted to an accountant to examine the books of the parties, found, that two of the bills "appear, from Pentland's books, to have been accommodation-bills, for his own behoof, and are entered by him in his own hand in his books, on the same side as all other bills payable by, and not to him;" that to the third, the conclusions of the action were not applicable; and as to the fourth bill, "in respect of the whole circumstances, and of the suspicious nature of the pursuer's books, and that he had failed to give a satisfactory explanation thereof, before answer, allow Bell & Co. a proof *prout de jure* of their allegations," and, *quoad ultra*, assoilzied them. On a report of the proof (23d January 1823), the Court reduced the fourth bill; and they adhered, on a petition for Pentland & Son, maintaining that the proof was incompetent, and that the allegation of no value could only be proved by writ or oath.

The knowledge of want of value merely, between the drawer and accepter, is not, however, fatal to the indorsee's claim. It was so held by Lord Chancellor Eldon, in Smith *v.* Knox, 3 Esp. Rep. 46, in which his Lordship said,—"If a person gives

and the terror of imprisonment; for it is of no importance in what shape the document appears, if it be destitute of those qualities that are essential to every obligation; and no obligation extorted by force or fear, is, or ought to be, binding on the granter.[w]

Is indorsee affected by unlawful consideration?

In the same manner, a bill originally granted for an unlawful consideration, is of no force against the granter, to whomsoever it may be afterwards indorsed. A bill, for instance, given for a game-debt above L.5,[x] contains such a *vitium reale*, as to render it ineffectual, even in the hands of an onerous indorsee.[y] But if the bill be

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a bill of exchange for a particular purpose, and that is known to the party who takes the bill; as if, for example, to answer a particular demand, then the party taking the bill cannot apply it to a different purpose; but where a bill is given under no such restriction, but merely for the accommodation of the drawer or payee, and that is sent into the world; it is no answer to an action on that bill, that the defendant accepted it for the accommodation of the drawer, and that that fact was known to the holder; in such case, if the holder gave a *bona fide* consideration for it, he is entitled to recover the amount, though he had full knowledge of the transaction." See also Charles *v.* Marsden, 1 Taunt. 224.

[w] 1776, Willocks *a.* Callendar, Dict. 3. 81, Mor. 1519. 1787, Wightman *a.* Graham, Fac. Coll. No 9. p. 16. Mor. 1521.

[x] The act applies to sums of any amount, sup. p. 80.

[y] Mor. 1509.—No direct decision upon this point appears to have been collected. It is not, therefore, exactly known what were the principles upon which the Court proceeded. It may, however, be inferred, that the intention was to crush, as far as possible, gambling transactions, by annulling every document given for a gaming-debt. But though the holder cannot recover from the original granter of the bill or note, he may do so either from the indorsers who have received value and passed the bill, without knowing any thing of the purpose or consideration for which it was at first given, or from the drawer who was privy to it. For as every indorsation of a bill constitutes a new and separate contract between the indorser and indorsee, independent of that between the drawer and accepter, the bill, though void

indorsed away before acceptance, and is afterwards accepted in the hands of the indorsee, it

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on the original transaction, and between the original parties, may be sufficiently binding as to subsequent ones. A *bona fide* indorsee, therefore, who has given value for the bill, ought, at all events, to have an action upon it against the indorser from whom he derived the right, and all preceding indorsers. The objection to a bill, that it was granted for an unlawful consideration, may be very good in the mouth of an accepter; but could not, with any propriety, be pleaded by the drawer who had indorsed away the bill for value. If this were allowed, the law rendering bills for game-debts ineffectual, even in the hands of an onerous indorsee, might be productive of more mischief than it intended to repress. It would, in fact, be opening a door for swindling and fraud, and would totally destroy the confidence, which is so necessary for the exercise and promotion of commerce.

In some of the English cases, however, it would appear that a bill granted for an unlawful consideration is void *ab initio.* An action was brought by an innocent indorsee of a gaming-note, who paid a valuable consideration, against the accepter, to whom the money was lent, and it was held he could not recover. Bowyer *v.* Bampton, 2 Str. 1155. And the law is thus stated by an English writer:—If a bill of exchange or note is given in consequence of an usurious contract, it is absolutely void when in the hands of an innocent person, who may have taken it in the fair and regular course of business, without any notice of the usury; and evidence of usury will be a good defence in an action brought upon such bill or note against the drawer, accepter, or indorser. Manning, Law of Bills, p. 65. It is evident, however, that upon the common principles of justice, as well as of expediency, the holder of a bill ought in all cases to have an action against the indorser, to whom he has paid value. Kyd, p. 283. Ord on the Law of Usury, p. 133. —A.

It had been formerly decided in Neilson *v.* Bruce, 25th Jan. 1740, Mor. 9504, and Stewart *v.* Hislop, 11th Feb. 1741, Mor. 9510, that the *bona fide* indorsee to a bill was not affected, even in a question with the accepter, by the circumstance of the original consideration having been a gaming-debt. A different opinion is, however, now entertained, and there is no doubt that the doctrine stated in the text as to bills of that description, which is in consistence with the words of the statute, and the construction put upon it in the English courts, will be adopted, whenever the point is again tried. Chitty, 78. Bowyer *v.* Bampton, *sup.* Bell's Comm. I. 242. Indeed, it is stated, at the page of Morison's Dict. cited

ought to bind both the accepter and the drawer-indorser; for the former, by accepting the bill in the hands of a third party, homologates the right of that party to demand payment from

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above, (1509), that decisions contrary to the cases of Neilson and Stewart had been since pronounced.

The *drawer* of a bill for a gaming-debt, however, will not be allowed to plead that objection as a defence against an onerous holder. Edwards *v.* Dick, 4 B. & A. 212, where the drawer of a bill for money won at gaming, defended himself upon the statute of Queen Anne, from an action by an onerous payee. Bayley, J. thought this no defence, because by indorsing the bill, defendant affirmed it to be free from exception, with which this defence was inconsistent, and rejected the evidence. On motion for a new trial, the Court thought he did right, for defendant was not within the spirit of the act against gaming. It was not for a person standing as he did, that the act intended protection; compelling payment from him was not advancing any practice the statute meant to suppress, and giving him protection would assist a winner, whom the act meant to discountenance, and would enable him to set up his own misconduct to bar the honest claim of an innocent indorsee.—Rule refused. Bayley, 416, extends this doctrine to all cases of bills for illegal considerations. He states the law thus:—"It is no objection in an action against an indorser, that the bill, or note, was drawn upon a gaming, or usurious, or other illegal consideration; for though the statute against gaming, &c. makes such bill void to all intents and purposes, the proper construction upon those words is, that it makes it void as far as can be necessary to further the objects of the act; but it does not avoid it in favour of a party, whom the statute meant to punish, not to protect."

Mr Glen's opinion, that the indorsers not engaged in the gaming transaction ought to be held liable to the holder upon their indorsations, is supported by equity, and by the principle which appears to have governed the Court of King's Bench in the case of Edwards *v.* Dick, that the statute of Queen Anne is to be construed with reference to the evil which it was intended to repress; "that," as was observed by Abbot, C. J., "will be effectually accomplished, by holding the securities to be void for any purpose of enforcing payment of the money won at play. The drawer, therefore, of such a bill of exchange cannot maintain any action against the accepter. Now, if he could, by passing the bill to a third person, enable him to sue the accepter, that would be within the mischief of the act. It follows, therefore, that no person, deriving title through the drawer, can be in a different situation from the drawer, so as to sue the accepter." This construction of the language of the statute seems to warrant the con-

Unlawful consideration.

him.[z] In the case of Perchard and Brock *a.* Breckenridge, &c., a bill for smuggled goods was held good in the hands of onerous and *bona fide* payees, in whose favour it had been originally drawn and accepted;[a] and from the principle of the decision, we may presume that the bill would have been so in the possession of an onerous indorsee. This, however, is rather inimical to the doctrine which the decisions on analogous points have a tendency to establish, viz., that a bill granted for an unlawful consideration is ineffectual against the granter, even in the hands of an onerous indorsee.[b] If the

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clusion, that the *bona fide* holder of a bill for a gaming-debt, may sue the drawer and all the indorsers; and by this no injury is done to these indorsers, for each is liable to an action for the value which he received when he indorsed the bill. Chitty, 81.

[z] Ord on Usury, p. 133. If a bill is given for money won at play to the winner, or order, and the winner indorses it to a stranger for a just debt, and the person upon whom the bill was drawn accepts it in the hands of the stranger, the accepter would be liable, and the indorser would also be liable to such indorsee. Com. Rep. 6.—A.

A renewed security to a *bona fide* indorsee is valid, though the original consideration was a gaming-debt. George *v.* Stanley, 4 Taunt. 683.

[a] 1791, Bell's Cas. p. 121. Mor. 1523. In this case, it was found, that the holders were bound to answer every question relative to the onerosity, and tending to shew the nature of the transaction.—A.

In Chalmers *v.* Lanion, 1 Camp. 383, it was taken for granted by the Court of King's Bench, that it is no defence against an onerous indorsee, that the bill originated in a smuggling transaction; also in Banks *v.* Colwell, cited 3 T. R. 81; but the indorsee was there held liable to the objection, because he had taken the bill after it had become due.—Post. p. 148. note [k].

[b] The decisions to which Mr Glen alludes,—those relating to bills for gaming-debts,—were founded on the express words of the statute of Queen Anne, *sup. p.* 80. The general rule is, that a *bona fide* indorsee to a bill is not affected by the nature of the original consideration, whatever it may have been, except when a statute declares the bill to be absolutely void and null, on account of the consideration.—Chitty, 80-1. This

consideration for which a bill was originally given was not illegal, and the bill is afterwards indorsed for an unlawful consideration, this cannot affect the right of the indorsee to insist against the accepter, however it may operate against his claim on the indorser.[c]

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distinction has not been attended to by the author in the observations in the text. It was accordingly decided in Craig *v.* Shiells and Co., 15th Dec. 1809, Fac. Coll. *sup. p.* 139, note [v], that a bill granted to induce particular creditors to accede to a composition, which is prohibited by the present bankrupt act, was nevertheless valid in the hands of a *bona fide* indorsee. See also Arrol *v.* Marshall, *sup. ib.*

It was formerly held in England, that the nullity of a bill under the statute of usury, equally affected it in the hands of a *bona fide* indorsee. Low *v.* Waller, Doug. 735.—Lowes *v.* Mazzaredo, 1 Stark. 385. There appear to be no decisions on this point in Scotland, except a notice in the Fol. Dict. 4, 394, that the objection was dismissed, 1773, Dec. 13. Mor. 16432. But all doubt is now removed in both countries, by 58 Geo. III. ch. 93, (10th June 1818,) by which it is enacted, "that no bill of exchange or promissory-note, that shall be drawn or made after the passing of this act, shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting, or paying such consideration for the same, actual notice that such bill of exchange or promissory-note had been originally given for a usurious consideration, or upon a usurious contract." See Bell's Comm. I. 242.

[c] Parr *v.* Eleason, 1 East. Rep. 92. A bill of exchange was indorsed over by the payee for an usurious consideration, and the indorsees negotiated the bill, which was afterwards paid to the assignees under the bankruptcy of the original indorsees (being subsequent to their indorsement), in satisfaction of a debt due to the bankrupt's estate. Lord Kenyon was of opinion, that the assignees had a right to protect their possession of the bill by the title of the party from whom they received it in payment, who was an innocent holder, and that the bill being valid in its inception, the statute of usury did not apply to that case; and when the case came again before the Court on a rule to shew cause (although it was argued, that as the bankrupts could not have maintained an action against the first indorser, a title could

Defence of intoxication and prescription.

It is no good defence against an indorsee, that the bill was elicited, without value, from the accepter when intoxicated,[d] as drunkenness is but a temporary incapacity, created by the accepter's own fault, and to admit of such an excuse, would tend to encourage an improper vice, and afford a ground for quarrelling bills on the most captious pretences. Neither is it a sufficient reason for refusing to pay to an onerous indorsee, that an accepter, who admits his subscription, and does not allege previous payment, pleads that the bill is prescribed, and that it had been accepted solely for the accommodation of the drawer, as the right of the indorsee cannot be affected by the cause of granting the bill, and the debt (at least it was so found) being as much due as on the day the bill was accepted.[e]

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not be derived through him to the assignees), the rule was discharged. Ord, 139.—A.

The same was again decided by Lord Kenyon in Daniel *v.* Cartony, Esp. 274. But Lord Ellenborough and the Court of King's Bench have, in a subsequent case, held that a *bona fide* indorsee cannot recover from the accepter, when there has been usury in an intermediate indorsation, because he cannot bring himself in connexion with the accepter, but through the usurious indorsation. Lowes *v.* Mazzeredo and others, 1 Stark. 385. The rule established by the late statute (quoted in note [b]) would probably be now held to govern such cases. See Chapman *v.* Black, 2 Barn. and Ald. 588.

It is to be observed, however, that the statement in the text, that an indorsee giving an illegal consideration for the indorsation, has a claim against the accepter, is incorrect. Such an indorsee will have a claim against none of the prior parties, but a *bona fide* indorsee, taking the bill subsequent to an usurious indorsation (as was the case in the questions determined by Lord Kenyon), will, it is thought, have a claim against all the prior parties, without exception.

[d] 1736, Wilson, &c. *a.* Nisbet, Dict. v. 1. p. 98.

[e] 1800, Philp *a.* Milne, Fac. Coll. No 155. p. 349. Mor.

Indorsation in security.

A creditor to whom a bill was indorsed in security of a just debt, was found not to be affected by a back-letter of the indorser to the accepter of the bill, more than if he had taken the bill in full payment. But in so far as a bill stands in the person of an indorsee, as trustee for the indorser's other creditors, whose debts were contracted prior to the date of the bill and the trust, a back-letter to the accepter will operate against these debts,—because such creditors cannot be said to be onerous indorsees, or to have lent their money on the faith of a bill, which was not in existence, or assigned for their behoof, till after the debts were contracted.[f] A person who had granted an obligation for bills indorsed to him, was found, notwithstanding, to be an onerous indorsee, and not obliged to allow

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App. to Bill of Exchange, No 9. This decision is now held questionable.—See ch. xi.

[f] 1757, Douglas *a.* Elliot, Fac. Coll. No 8, p. 13. Mor. 1515. In this case the bill was not *indorsed,* but *assigned* to the trustee, whence it was argued, that the trustee's right was to be considered as no better than that under a common assignation, in which case the assignee is affected by the back-bonds or qualifications created by the cedent before the assignation. Bankton, B. 1. T. 13. § 17. is favourable to this opinion; Erskine, b. 3. t. 2. § 31, disapproves of it; and it appears that the Court, in the above case, held the right of the assignee to be affected by the back-letter, so far as regarded the debts due his constituents, but not to be affected by it, as to the debt due to himself. Should the case occur of an *indorsation* of a bill to a trustee for behoof of the indorser's creditors, a contrary decision would probably be given, as there is no distinction between a right conveyed to a trustee, and to the creditor himself; and it is quite fixed, that the holder of a bill, in security of a prior debt, is entitled to all the privileges of an onerous indorsee.—Perchard and Brock *v.* Breckenridge and others, *sup.* The case of Herries & Co. *v.* Crosbie, 22d Feb. 1775, Mor. 2577, seems to be a decision to this effect.

for, or admit partial payments not marked on the bills themselves, unless in so far as he had agreed to do so.[g]

Effect of extraneous clauses on indorsation.

A bill may be indorsed though the holder has written on the back of it that he had drawn a separate bill for the amount, if that bill be dishonoured,[h] and an obligation contained in a bill distinct from the bill itself, if it be not of such a nature as to vitiate the bill, is transferable by indorsation.[i] But as indorsation is a relative writ which must stand or fall with the bill, any clause in the principal which renders it void must of necessity annihilate the accessary obligation. Thus, a bill with annual rent and penalties being found null, an indorsation of it, though bearing for value received, was ineffectual.[k]

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[g] 1778, Burnet *a.* Ritchie, Dict. v. 3. p. 82. Mor. 1519.

[h] 1714, Mitchell *a.* Brown, Mor. 1567. The separate bill had been refused acceptance in the hands of an indorsee, and upon this the first bill, which had been duly accepted, was also indorsed to him for the value which he had given for the unaccepted draft, and the accepter was held liable, notwithstanding the writing on the back.

[i] 1727, Grierson *a.* Earl of Sutherland, Dict. v. 1. p. 97. Mor. 1469 and 1527. But it must be seen that the obligation does not require a separate stamp.

[k] 1730, Thoirs *a.* Fraser, *Ibid.* p. 1469.

It has been much disputed, whether an indorsee to a *past due bill* is affected by the pleas which might have been urged against the indorser, or if he is in as favourable a situation as the indorsee to a bill not due. So far it is agreed, both in Scotland and England, that if the indorsee was aware of the dishonour of the bill, he will be liable to all objections,—and that marks of dishonour, such as noting, or very slight evidence, will be sufficient to prove his knowledge of it. Bell's Comm. I. 314. Wilkie *v.* Wilson, *post.* Chitty, 127. Brown *v.* Davis, 3 T. R. 80.

But the Scots and English courts have come to opposite conclusions, as to the effect to be given, *per se*, to the circumstance of a bill being past due when indorsed. In England, it is now

To constitute an indorsation, no particular set of words is necessary, either to convey the sum

Form of indorsation.

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fixed, after some difference of opinion, that "a man who takes a bill after it is due, takes it subject to all the objections and equities, to which it was liable in the hands of the person from whom he takes it." Bayley, 118. Brown *v.* Turner, 7 T. R. 730, where an indorsee to a bill overdue was held to be affected by the illegality of the original consideration, which would not otherwise have been the case. Tinson *v.* Francis, 1 Camp. 19, where Lord Ellenborough said, "after a bill or note is due, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he give a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be encumbered." Lee *v.* Zagury, 8 Taunt. 114. Here a past due bill was sent to an agent to receive payment. The agent indorsed it away for a debt of his own, and the indorser took a new bill from the accepter. Gibbs, C. J. held that the indorsee was liable to the consequences of the agent's fraud, and that the second bill must belong to the original holder; in which the other Judges concurred.

Exceptions have been allowed to this general rule, where a bill is redelivered, after it is due, to a person, on the same consideration for which he had held it before it was due, Bosanquet *v.* Dudman, 1 Starkie, 1;—where the indorsee's immediate indorser could have recovered on the bill, and the objection stated is only available against one of the former holders, Chalmers *v.* Lanion, 1 Camp. N. P C. 383;—and where it is the fault of the person objecting, that the bill has been circulated when past due, Boehm *v.* Stirling, 7 Term Rep. 423. See another exception sustained in Charles *v.* Marsden, *sup.* p. 141, note, where the objection was merely, that the bill had been granted without value. But this exception is not to be held as established, a similar objection having been given effect to, by Lord Ellenborough, in Tinson *v.* Francis, *sup.*

On the other hand, it has been repeatedly decided in Scotland, that unless the indorsee is proved to have been acquainted with the dishonour of the bill, or the objections against it, the circumstance of its being past due does not render him liable to the pleas, which might have been stated against the indorser. This was recognised in a series of decisions prior to the act 12 Geo. III. c. 72, establishing the sexennial prescription of bills; though the extraordinary privileges of indorsees were not then carried down so long after the term of payment, as has been done in cases posterior to that act. Thus, in Murray *v.* Grierson, 18th Feb. 1715, Mor. 1623, the Lords found, "that the pursuer was only in the case of an assignee to a debt, and

in the bill completely to the indorsee, or merely to appoint him agent to receive payment in be-

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had not the privileges of the possessor of a bill of exchange, both in respect that the bill was indorsed to the drawer without a protest against the accepter; and *separatim*, in respect that the bill was suffered to lie over without any diligence for five years; for they thought that no merchant would accept of such a bill in the way of commerce, to afford the extraordinary privileges of bills of exchange during the course of the long prescription." The same was found as to a bill three years past due, in Farquharson *v.* Brown, 6th Feb. 1719, Mor. 1626; and as to one four years past due, in Thomson *v.* Colvill, 1st Feb. 1749, Mor. 1632. On the other hand, in Grierson *v.* Earl of Sutherland, Feb. 1728, Mor. 1626, compensation was not allowed to be pleaded against a bill which had lain over two years and eleven months. A different rule was, however, applied in Scougal *v.* Kerr, 24th Feb. 1762, Mor. 1407 & 1641. Lord Kames, in his report of that case, says, that "a bill, before the term of payment, is considered, as a bag of money, to pass from hand to hand without obstruction. But as the accepter has broke his engagement, if he suffer the term of payment to elapse without offering payment, a bill, after the term of payment, can no longer be considered as a bag of money. It degenerates into an ordinary security, resembling a bond, after the debtor has suffered a denunciation to pass against him. No man will take such a bill in expectation of prompt payment, more than an assignment of a bond; and therefore every exception competent in the one case, ought to be equally competent in the other. For this reason, against a bill of L.16 Sterling accepted as the price of cattle, and claimed upon by an indorsee, for value, 18 months after the term of payment, compensation upon a debt due by the drawer to the accepter was found competent. Some of the Judges were for sustaining compensation immediately after the term of payment. But the plurality were for continuing the extraordinary privileges of a bill, as long as it can be the foundation of summary execution, that is, for six months. This case, therefore, must be considered as a precedent, putting the privilege of summary execution, and the privilege of barring compensation, upon the same footing, so as that both should be lost together."

But in Elliot *v.* M'Kay, *sup.* p. 133, note [d], decided after the passing of the act 12 Geo. III., a plea of compensation by the accepter against the former holder was repelled, though the bill was indorsed, when 18 months past due. "The Lords were of opinion, that the statute 12 Geo. III. ought to make an alteration of the former practice of the Court in similar questions; and therefore,

half of the indorser. In both cases, it is sufficient that the indorser's name be written on the back of the bill by himself, or by some other

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they found, that in the present case compensation was not proponable." In Robertson *v.* M'Glashan, *sup. ib.* a similar plea was repelled on the same ground, in the case of a bill which had been indorsed for value *five* years after it had become due. See also Wilkie *v.* Wilson, 30th Nov. 1811, Fac. Coll. in which the bill had been indorsed when three years past due. It is stated, in the report, " that the Judges were almost unanimously of opinion, on general grounds, that where there was no circumstance of fraud in the case, and where it was not dishonoured on the face of it, a bill of exchange, indorsed when past due, was entitled to all the statutory privileges, and that the indorsee was not liable to the same objections as the drawer." And in like manner, in Crawford *v.* Robertson's trustees, 30th June 1814, Fac. Coll. in the case of a bill also indorsed when three years past due, a plea of compensation by the accepter against the drawer was repelled.

It is to be regretted, that a contrariety of practice on so important a point, should exist between the two countries. Though the question must now be held as fixed in the Scots courts, by so long a series of decisions, it may be doubted whether the rule at last adopted in England, is not, on the whole, the more correct and advantageous. Mercantile expediency, which is the sole foundation of the extraordinary privileges of indorsees, does not require that the negotiation of past-due bills should be encouraged. Besides, when payment of a bill is refused, or not demanded, on account of valid objections to the holder's claim, the obligants will in general find it impossible to bring these objections forward, so as to affect the bill in the holder's hands. To permit the holder, in such circumstances, to give an unchallengeable title by indorsation, (which he will have a strong inducement to attempt,) exposes the obligants to the risk and hardship of losing the benefit of their objections altogether. On the other hand, this evil would be removed by putting it on the indorsee to inquire into the reality of the debt, a duty which could not be considered unreasonable, because an indorsee to a past-due bill may naturally suspect the existence of objections to it. The act establishing the sexennial prescription, which has been held to warrant the extension of the privileges of indorsees for the same period, seems to relate only to the validity of the bill itself as a probative document of debt, (see ch. xi.) and not to the duration of any of the privileges, which the convenience of commerce merely has bestowed on the parties.

Form of restricted indorsation.

person duly authorised by him. But an indorsation may be restricted, as where it is made, "pay to such a person for my use," which prevents a blank indorsation from being filled up by the indorsee, so as to convey any interest in the bill to himself, and from transferring it to another, so as to give him a right of action, either against the person imposing the restriction, or any of the preceding parties. By an indorsation of this sort, the indorsee acts merely as agent or procurator for the indorser, and, according to some writers, payment to him may be countermanded by the proprietor of the bill;[l] but according to others, and apparently with more reason, it cannot.[m] In England, it has been ascertained, that any indorser may restrain the negotiability of a bill, by using express words to that effect, as by indorsing it "payable to J. S. only," or "the within must be credited to J. S.;" or by any other words clearly indicating his intention to make a restrictive or limited indorsement.[n]

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[l] Molloy, b. 2. ch. 10. § 22. Mar. 72. Scarlett, ch. 16. R. 6. Scac. § 2. gl. 5. n. 450.

[m] Beawes, n. 219. See also Poth. n. 165. 188.

[n] Chitty, 136-7. Kyd, p. 100. Bayley, 102-5. An indorsation "pay to A., or order, for account of B." will not prevent A. from indorsing for value, if it be under circumstances, which may induce a belief that such value is to be applied to B.'s use; but it will, from indorsing for A.'s private debt. Treuttel *v.* Barandon, 8 Taunt. 100.

An indorsation may also be *conditional.* Robertson *v.* Kensington, 4 Taunt. 30, where plaintiff indorsed a bill, "pay the within to Clerk & Ross, or order, upon my name appearing in the Gazette as ensign in any regiment of the line, between

Indorsation after whole or part of sum paid.

After a bill has been paid, no indorsation can take place, so as to affect the accepter or any of the parties, who would otherwise be discharged;[o] nor can an indorsation be made after acceptance, for less than the full sum in the bill; for, were it otherwise, the accepter or drawer would be liable, upon one entire obligation, to as many actions or diligences, as the payee or indorsee might think fit to split the sum into, by partial indorsations.[p] But where, before acceptance, a bill is indorsed for part of the sum for which it is drawn, the accepter may, by his acceptance after this indorsation, subject himself to pay according as the bill stood at the time of the acceptance; and where part of the bill has been paid, it may be indorsed for the remainder.[q] When a foreign

Of bills in sets.

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the 1st and 64th, if within two months from this date." Defendants accepted the bill after it was so indorsed, and nevertheless paid the amount to an indorsee of Clerk & Ross, Robertson's name having never been in the Gazette. He was found entitled to recover from them the amount of the bill.

[o] A bill is indorsable, *ad infinitum*, by the drawer or any of the indorsers who takes it up, till it is actually paid by the accepter; and this is not objectionable under the stamp-laws, Chitty, 57. Callow *v.* Lawrence, 3 Maule & Sel. 95. But the subscriptions subsequent to that of the party taking it up, must be deleted; for if the effect of the new indorsation is to make any of the parties liable to the indorsee, who would otherwise have been discharged, the indorsation will be invalid. Beck *v.* Robley, B. R. Tr. 14 Geo. III. cited 1 H. Blackstone, 89, n. See Bayley, 125-6. See also case of Fairholm, Mor. 1474, *sup. p.* 136-7.

An indorser, who takes up a dishonoured bill from the holder, is entitled to recover its full amount from the antecedent parties, though one of these parties may have previously made a payment to account to the holder, provided the indorser was ignorant of such payment, Bayley, 121.

[p] Kyd, 109. See as to the effect of payment, ch. v.

[q] Chitty, 139-40.

bill drawn in sets is indorsed, each part must be delivered to the indorsee, otherwise the same inconveniences may follow, which, as before stated, may arise from neglecting to deliver each of them to the payee.

Effect of a bill being lost.

In the event of a bill blank indorsed being lost, the person entitled to it should immediately give notice thereof to the accepter and all the antecedent parties;[r] and if it be a note transferable by mere delivery, public notice of the loss ought to be given. The drawer of the bill is, in this case, obliged to grant a new bill to the payee, upon his finding sufficient security, that no loss or damage shall accrue to the drawer on account of the first.[s] An onerous indorsee, however, is entitled to payment of a bill from the drawer, although it has been lost by, or stolen from, the holder.

Case of Lambton & Co. *v.* Marshall.

Marshall, for Carrick, Brown, & Co., bankers in Glasgow, drew a bill bearing to be his "first of exchange," on Moffat, Kensington, & Co., their correspondents in London, payable to Millar & Co., or order. It was indorsed by Millar & Co., and, after passing through several other hands, came into possession of Weatherall & Geering of London, whose clerk had his pocket-book containing the bill stolen from him, as he was carrying it for acceptance. The theft was notified in the

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[r] Beawes, n. 179.—Poth. n. 132.

[s] Poth. n. 130, 131.—Mar. 80.—Sav. tom. 2. liv. 3. ch. 5.—Beawes, n. 177.

Daily Advertiser; but the bill not being recovered, Marshall granted a second, "his first, of the same date and tenor, not being paid," on receiving an obligation from Weatherall & Geering, to indemnify his company against the appearance of the first. The first bill, with seven blank indorsations on it, was presented the day before it fell due, to Lambton & Co., bankers in Newcastle, by the last indorser, with whom they were totally unacquainted. They discounted and remitted it to their correspondent in London, who presented it to Moffat & Co. for payment, on the day it fell due. This was refused, as the second bill had been previously paid. The bill was therefore protested by Lambton & Co., and a charge given to Marshall for payment.

In a suspension, appearance was made for Weatherall & Geering, who, with Marshall, pleaded, that Marshall, in granting the second bill, acted according to established practice; and as the loss must fall either on Weatherall & Geering, or Lambton & Co., it ought to be borne by the latter, who, in discounting the bill to an utter stranger not recommended to them, transgressed a rule of bankers, which is very salutary in preventing persons, acquiring bills *mala fide*, from obtaining payment; and particularly after the advertisement in the newspaper, the discounters could not be considered as without blame in the transaction.

The Lord Ordinary, in respect the discounters paid, *bona fide*, full value for the indorsation to

the bill, and that it was not offered to be shown they were in the knowledge of the bill having been stolen or lost, found the granter liable to pay it, reserving to him relief against the indorsees, by whose clerk it was lost. To which judgment the Court adhered, on the general ground, that there is no *rei vindicatio* against onerous holders of bills or bank-notes.[t]

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[t] 1799, Lambton & Co. *v.* Marshall, Fac. Coll. No 132, p. 302. Mor. App. to Bill of Exchange, No 8. This decision appears to be in some degree incompatible with the security and confidence of merchants, who, in their foreign bills, generally draw three of the same tenor and date, only one of which is payable, while the others are unpaid. Were a needy payee to indorse away the whole set for value, or, what amounts to the same thing, were two of the bills to be lost, and afterwards to come into the hands of onerous and *bona fide* holders, according to the principle of the decision, the drawer would be liable for the whole. This, upon some occasions, might be productive of very mischievous consequences in the mercantile world, and would, in fact, render nugatory the condition expressed in each bill, that it is only payable, the others remaining unpaid, which is introduced for the express purpose of guarding against such casualties.—A.

This decision has not the tendency attributed to it by the author, because the bill which was lost, and which was claimed on by Lambton & Co., did not contain *the condition*, that it was to be payable only, "if the second, of the same date and tenor, was not paid;" which words are necessary to prevent the parties in foreign bills from being obliged to pay the whole bills of a set. Bayley, 24, sup. p. 28.

A similar decision, sustaining the right of a *bona fide* indorsee to a blank indorsed bill which had been stolen, was pronounced in Scott & Co. *v.* the Kilmarnock Bank, 27th Feb. 1812. Fac. Coll. The ground on which these cases rest, is, that as each possessor may fill up the indorsation in his own favour, a bill, blank indorsed, is the same as a bill or note payable to the bearer, and is, therefore, transferable merely by delivery. Chitty, 134. It is different when the bill lost or stolen had a full indorsement on it; in that case, the subscription of the indorsee is necessary to confer a title on subsequent parties, who will acquire no right, should the thief or finder *forge* an indorsation. Bayley, 106.

Case of Lawson, &c. v. Weston, &c.

Another case regarding a lost bill was decided in England in 1801. A bill, of the following tenor, "March 30, 1801. Fifty days after date, pay to the order of Mr Thomas Stokes, five hundred pounds, value received. William Vasey," was accepted by the Southwark Banking Company, and was indorsed by the payee to William Speirs, who had the bill stolen from him with his name on the back of it. It then passed into the hands of a person, who described himself as J. Warren, who got the bill discounted by the Richmond Bank. The discounters brought an action for payment of the bill against the acceptors, who were nominal defendants, as they were to be indemnified by the party who had lost the bill. The case of Grant & Vaughan, which was decided in 1764, was rested on as authority by plaintiffs. In that case, Lord Mansfield said, if one of the two persons had been guilty of negligence, and the question was, which of them should bear the loss, the answer was clear; he who had been guilty of negligence. Mr Spiers, the holder of the bill, ought not to have indorsed it, till he had been going to pay it away. If he had kept it unindorsed in his possession, it would have been perfectly safe.[u]

Fictitious indorsation.

A fictitious indorsement to a bill is forgery. Such indorsation is clearly giving it a false credit; and, on that principle, it is made with intent to defraud: for persons who receive bills consider

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[u] Lawson, &c. v. Weston, &c. Manning, p. 79.

every name on them as an additional security or pledge to indemnify them from loss: but if the *real* indorser fails, recourse cannot be had upon a *fictitious* or *imaginary* one. To make use, therefore, of a fictitious name, as a pretended indorser of a bill, is forgery, with intent to defraud.[v]

Where a bill or note is payable to two persons, *or* either of them, an indorsation by one is effectual, though they be not in partnership.[x]

It has been seen,[y] that a bill left blank in the drawer's name, in the repositories of a deceased person, may be filled up by his representative as drawer; and, on a similar principle, it may be

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[v] Manning, p. 33, and cases quoted. Bayley, 434, and cases there quoted. As to improbation of bills on alleged forgery, see 1743, Robertson *a.* Allisons, Dict. 3. p. 313; Mor. 6774, and 1747, A. *a.* B. Falconer, v. 1. No 187. p. 252. See also, as to the uttering of forged notes, 1782, King's Advocate *a.* Macafee, Fac. Coll. Appendix, No 1. p. 1.

The effect of a fictitious signature to a bill, upon the obligations of the parties, has frequently been under the consideration of the English courts. The result is said by Mr Chitty, 64, to be, "that a bill payable to a fictitious person, or his order, is in effect a bill payable to bearer, and may be declared on as such, against all the parties, knowing that the payee was a fictitious person." Where the party sued was ignorant of this, Lord Ellenborough held the bill to be void, *ib.* note [e]. In Leach *v.* Hewitt, 4 Taunt. 731, where a bill was drawn in name of a fictitious drawer, on a fictitious accepter, in favour of defendant, who was ignorant of the deceit, it was held defendant was entitled to notice of non-payment from a *bona fide* indorsee, and that he was discharged by neglect of it.

There are no reported cases in Scotland on the subject of fictitious signatures to bills.

[x] Kyd, p. 108.

[y] Ch. 2. p. 49.

presumed, that if a bill or note be granted to a woman, while single, and she afterwards marry, the right to transfer it by indorsation would vest in the husband, as, by the marriage, he is entitled to all her moveable property; and no married woman can grant, or come under, personal obligations.[z]

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[z] An indorsation by a wife is not valid, unless in circumstances which create a presumption, that she acted as the agent of her husband. Bayley, 111, 112.

The representatives of the deceased holder of a bill will be entitled to indorse it away, after making up a title to it by confirmation.

See farther as to the parties entitled to indorse bills, ch. II.

# CHAP. VI.

## OF PAYMENT.

Holder must present bill for payment.

As the drawer and indorsers of a bill are only liable in the event of the accepter's failing to pay, they are materially interested, that the utmost strictness and punctuality be observed on the part of the holder, in applying for, and procuring payment from him. It is therefore incumbent on the holder to present the bill for payment immediately when it falls due; and any omission or neglect on his part will preclude him from seeking recourse on the other parties.[a]

*Where* presentment must be made.

Where a place of payment has been specified in the bill, it ought to be presented at that place; and if no place is mentioned, payment should be demanded from the accepter personally, or at his counting-house, during the usual hours of

[a] The drawer and indorsers are not under the necessity of proving that they have suffered damage from the neglect; the law presumes that they have.—Chitty, 245.

A surety or guarantee that a bill shall be paid, will be freed, by neglect of presentment and due negotiation, if it appears he would otherwise have been safe.—Bayley, 232.

business,—or, if he be not in business, at his dwelling-house. If it appears that the accepter is dead, the holder ought to inquire after his personal representative, and present the bill to him;[b] and if there be no representative, demand payment at the last residence of the deceased.[c] If the accepter of a foreign bill has merely removed from the place, where the bill described him to be, the holder should use reasonable endeavours to find out whither he has removed, and present the bill for payment there. But if he has left the country, it is sufficient to demand payment at the place where he last resided.[d] Payment of bills, due by a company, ought to be demanded at their office or counting-house, within the usual office-hours.[e]

*When presentment must be made.*

Upon inland bills and notes, the three days of grace are usually allowed; and they should therefore be presented for payment on the last day of grace within reasonable hours;[f] but foreign bills ought strictly to be presented on that day before the post goes off, that the protest and notification, in case of non-payment, may be transmitted without delay.[g] It does not seem

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[b] Molloy, b. 2, c. 10, § 34.

[c] Poth. n. 146. Mar. 134.

[d] Chitty, p. 261. If it appear that the accepter has never resided at the place, described in his bill as his residence, or if he have absconded, it may be treated as dishonoured.—Bayley, 173.

[e] Forbes, p. 147.

[f] Manning, p. 37.—Kyd. p. 121.—Poth. n. 140.

[g] See note [i]. There is no distinction between foreign and inland bills, as to the necessity of presentment for payment on the

to be exactly ascertained[h] within what time bills payable on demand or at sight ought to be presented for payment; and, indeed, it must depend so much on the situation of the parties, and other circumstances, that it is difficult, if not impossible, to establish any other than a general rule, that there shall be no undue delay, as it is to be presumed that the granter of a bill of this description does not intend to give credit to the payee beyond the time necessary for presenting it. Among the merchants of London, checks or drafts on bankers given in that city in the course of business, and payable there on demand, must be presented for payment on the day they are received, within the usual office-hours,—or, if there be not sufficient time that day, they must be presented next morning as soon as possible.[i]

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last day of grace,—it is with regard to notification of dishonour only, that the latter are privileged. See ch. viii.

[h] Savary, tom. 2, par. 17.—Poth. 141, 143.

[i] Manning, p. 38.—See *sup.* p. 37, note [g].—For presentment for acceptance, see ch. iii.

The doctrine of *presentment for payment* is of so much importance, that it is necessary to state the rules, which ought to govern conduct of the holder of a bill in regard to it, more minutely than is done in the text. The following, with what is there stated, seems to contain the amount of the authorities on this subject:—

1. Presentment for payment must be made by the holder of the bill, or by an agent competent to give a legal receipt for the money. And it is said, that if the holder is dead when the bill falls due, his executors must present it, though they have not proved the will.—Chitty, 247.

2. Bills or notes payable *on demand* (which are allowed no days of grace), must be presented for payment within *a reasonable* time.—Bayley, 187. And it is said to be now settled in England, that the reasonableness of the time is a point of law,

A bill may be paid, either to the holder, or to any one authorised by him, or to his executors

To whom payment may be made.

to be deduced by the court from the facts,—such as the distance of the parties, the course of post, &c.,—which have been found by the jury; the court also taking the opinion of the jury as to what is convenient in mercantile practice. The inconsistency of the verdicts of juries, when the question was left to them, led to this result.—Chitty, 269, 270, Darbishire and another *v.* Parker, 6 East, 3.—Bell's Com. I. 321. Bayley, 189, however, still considers this as a point unsettled; and in Fry *v.* Hill, 7 Taunt. 397, and Goupy *v.* Harden, 7 Taunt. 159, the reasonableness of the time was treated as a question of fact for the jury.

When such a bill is received in the place where it is payable, the holder is allowed till the following day to present it. Rickford *v.* Ridge, 2 Camp. N. P. 537. Chitty, 272-3. Pocklington *v.* Sylvester, sitt. at Guildhall after Trin. Term, 57 Geo. III. And when in a different place, it must at the latest be sent off by the post or other regular conveyance of the following day. Darbishire *v.* Parker, *sup.* Williams *v.* Smith, 2 B. & A. 496. Beching and others *v.* Gower, 1 Holt. 315, 316, where a draft on the Maidstone Bank, taken by plaintiffs at Tunbridge, was retained till the second morning after receipt, and then sent by the carrier, who arrived at Maidstone an hour after the post of the preceding day. Recourse was refused on the ground, that the extreme time up to which they were justified in keeping the draft, was till the post of the day after receipt. In Rickford *v.* Ridge, *sup.* Lord Ellenborough held, that the usage of a particular place could not affect the rules of law as to the due presentment of bills, but that it was always to be considered, whether, under the circumstances of the case, a check had been presented with reasonable diligence.

All bills, except those payable *on demand or at sight*, must be presented for payment on the last day of grace, or, if that is a day of public rest, on the second-last,—the number of such days being reckoned according to the law of the country, where the bill is payable. See the rules for calculating the *day of payment*, *sup.* p. 20, *et seq.* We have seen, *sup.* p. 119, that it is doubtful whether days of grace are allowed on bills payable *at sight*.

Presentment for payment must be made at a reasonable *hour* on the day of payment. If, by the known custom of a particular place, bills are payable between limited hours, presentment out of that time will be improper.—Bayley, 180. And a bill payable at a banker's, must be presented during the usual bank-hours of the place. Parker *v.* Gordon, 7 East. 385. The bill was accepted payable at Davison & Co.'s, who shut

and representatives, or tutors and curators, or to a factor having a special or general factory, whose

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up at six o'clock, and not being presented till after six, the plaintiff was nonsuited; and a motion for a new trial was afterwards refused by the court. Much greater latitude, however, is given when the accepter is not a banker. Barclay *v.* Bailey, 2 Camp. 527, where a presentment at eight o'clock in the evening was not held too late. Per Lord Ellenborough,—"A common trader is different from bankers, and has not any peculiar hours for paying or receiving money. If the presentment had been during the hours of rest, it would have been altogether unavailing, but eight in the evening cannot be considered an unreasonable hour for demanding payment at the house of a private merchant, who has accepted a bill." See also Morgan *v.* Davison, 1 Stark. 114. But presentment at the place of payment will be sufficient, though at an unreasonable hour, if a person be stationed there at the time to give an answer. Garnet *v.* Woodcock, 1 Stark. 475. The bill was presented at the bankers', where it was payable, between seven and eight in the evening, and a boy answered, "No orders." Per Lord Ellenborough,—"In general there are two presentments, —one in the morning, and the other in the evening; but if there be a presentment in the evening, and the party is ready to give an answer, the holder does all that is necessary. The banker returned an answer by the mouth of his servant, and *non constat*, but that he was stationed there for the express purpose."

3. Presentment for payment ought to be made at the *place of payment*, if one be mentioned in the bill. This is absolutely necessary, when a place of payment is contained in the *body* of the bill, Saunderson *v.* Bowes, 14 East, 500. Bowes *v.* Howe, 5 Taunt. 30, & 16 East, 112. And where a bill was addressed thus:—"To Messrs Fillis & Co. Plymouth, payable in London," and accepted by them "payable at Sir John Perring & Co.'s, bankers, London," this was held to be a part of the bill, and presentment there was found necessary, Hodge *v.* Fillis and another, 3 Camp. 463. In like manner, if a place of payment be *printed* on the bill, though at the foot, presentment there was held to be indispensable by the Court of King's Bench, in Trecothick *v.* Edwin, 1 Stark. 468. On the other hand, it is agreed, that a particular place mentioned at the bottom or margin of a bill or note, as a mere memorandum of the accepter's residence, or where he may be found, does not make presentment there necessary. Price *v.* Mitchell, 4 Camp. 200. Wild *v.* Rennard, 1 Camp. 425. Lord Chancellor's speech in Rowe *v.* Young, 2 Brod. & Bing. 172. But a difference of opi-

discharge will be sufficient. Payment, however, ought not to be made to the executors or repre-

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nion took place between the Courts of King's Bench and Common Pleas in the case of an accepter subjoining to his subscription, that the bill was to be payable at a particular place. By the former, such an acceptance was not considered a condition qualifying the bill, and obliging the holder to present it at that place, Saunderson *v.* Judge, 2 Hen. Bla. 509. Sebag *v.* Abithol, 4 Maule & Selwyn, 462, 1 Stark. 79. The Court of Common Pleas, however, decided, that such a memorandum qualified the contract, and that presentment at the place of payment so mentioned was necessary. Callaghan *v.* Aylett, C. P. 3 Taunt. 397, 2 Camp. 549. Gammon and another *v.* Schmoll, 5 Taunt. 344, 1 Marsh. 80. The point was finally determined by the House of Lords in Rowe *v.* Young, 2 Brod. & Bing. 165, in which the bill was directed to defendant at Torpoint, Devon, and was accepted "payable at Sir John Perring & Co.'s, bankers, London." The question occurred on the point of form, whether there ought to have been an averment, that the bill was presented there; and after the opinion of the twelve judges was taken, a decision of the Court of King's Bench, holding that averment unnecessary, was reversed, and the doctrine of the Court of Common Pleas established. This question is now set at rest by the statute 2 Geo. IV. c. 78, occasioned by the above decision of Rowe *v.* Young, and prefaced by a narrative of the inconveniences which were thought to result from the rule thereby established. By this statute it is enacted, that after the 1st August, 1821, an acceptance bearing to be payable at a particular place, without farther expression, shall be deemed a general acceptance to all intents and purposes; but if the acceptance expresses that the bill shall be payable at that particular place *only, and not otherwise or elsewhere,* such acceptance shall be deemed, to all intents and purposes, a qualified acceptance, and the accepter shall not be liable in payment, except on default after a demand at such place of payment. The terms of this statute being general, it is presumed that it must be held applicable to Scotland.

It would appear, however, that the holder's obligation to present for payment, will be sufficiently satisfied by presentment at the place mentioned in the bill, though by way of memorandum or marginal note only, Bayley, 174. And if a banker, at whose bank a bill is made payable, be himself the holder, it is sufficient for him to consult his books, and see if he has funds to that amount. Bayley, *ib.* Chitty, 260. If a bill, or note, be payable at either of two places, the holder is entitled to present it at which he chooses, though the other

sentatives, until they have made up proper titles, or to any other person, till they have shown a proper power to receive and discharge it.[k] Payment to a minor will be valid, if the bill be beneficial to him, and the sum profitably applied to his use;[l] but payment to a married woman

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be nearer, and though it appear, that if he had presented it there, it would have been paid. Beeching *v.* Gower, 1 Holt, 313.

4. The bankruptcy or insolvency of the accepter will not excuse the neglect of presentment to him for payment. Chitty, 246. Langley *v.* Hog, 17th June 1748, Mor. 1574. And it may be laid down in general, that want of presentment for payment will not be excused by any circumstances, from which the holder may merely infer, that it is very improbable the bill will be paid. Prideaux *v.* Collier, 2 Stark. 57. Chitty, 203-12. Neither will the shutting up or abandoning his shop or house, and the absence of the accepter, make presentment there unnecessary; for the holder ought both to present the bill there, and make inquiry after him. Chitty, *ib.*

If a bill has been accepted by an agent, in absence of the principal, and when it becomes due the principal is still absent, presentment must be made to the agent. Philips *v.* Astling, 2 Taunt. 206.

5. If a bill, or note, be left in the accepter's hands on a presentment for payment, the presentment will be held to be only of the date the money is called for, Hayward *v.* Bank of England, 1 Str. 550.

6. It is held in England, that the *accepter* of a bill cannot in general defend himself from an action for its amount, on the ground of want of previous presentment to him. The bringing of the action, it is said, is a sufficient request. If, however, a place of payment be mentioned in the bill, in such a manner as, according to the rules already explained, to qualify the contract, a presentment there must be proved, to give the holder a cause of action against the accepter. Chitty, 249, 250. But it is not necessary that the presentment for this purpose be on the very day the bill becomes due, unless the money is lost in consequence of the delay; in which case the loss must be borne by the holder. Bayley, 179.

For the cases in which want of funds in the accepter's hands will excuse presentment for payment, see ch. viii.

[k] Poth. n. 164. 166. Payment to one of several partners is valid. Chitty, 280.

[l] Ersk. b. 1. t. 7. § 33. Poth. n. 166. Payment should be made to the curator, which will free the accepter from all risk.

will not liberate the person paying, if he was in the knowledge of that circumstance. He is *in bona fide*, however, to pay to her even after marriage, until it be intimated to him.[m] When a wife is intrusted with the management of her husband's affairs, *præposita negotiis hujusmodi*, and in use to receive money for her husband on her own receipt, payment may safely be made to her.[n]

Payment to fraudulent possessor.

According to Pothier, payment of a bill to a person who is not the real owner of it, or empowered by him to receive its contents, will not liberate the accepter from paying a second time to the drawer or payee, if the first payment has not been occasioned by any fault on their part.

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If the curator should misapply the money, the minor can look to him alone for reparation. Ersk. *ib.* § 36. A minor engaged in trade is in a different situation. He may grant and hold bills like other traders, and payments made to him in the course of his business will exonerate the debtor making them. Ersk. *ib.* § 39. See *sup.* p. 43-4.

*Interdiction* affects only the heritable estate of the person interdicted, and therefore payment of a bill may be safely made to himself. Ersk. *ib.* § 57.

[m] Ersk. b. 3. t. 5. § 7. Poth. n. 167.

[n] Forbes, p. 15. Ersk. b. 1. t. 6. § 26. Poth. n. 167.

All payments to or by a *bankrupt*, after the date of the first deliverance on the petition for his sequestration, are prohibited by the present bankrupt-act. But an exception is introduced with regard to payments to him, if made without the knowledge of the bankruptcy. Payment *to* a bankrupt, previous to his sequestration, is quite effectual; but if it be by anticipation, the debt not being due till after the sequestration, the debtor exposes himself, if there be any appearance of a fraudulent intention, to the risk of being obliged to pay a second time to the trustee. Payment, in these circumstances, *by* a bankrupt, seems to be considered as still more questionable. Bell's Comm. II. 258.

He instances the case of a payee sending a bill by post, to his correspondent in the place where it is payable, with an indorsation to him, and instructions to receive payment in his behalf. The post is robbed on the way; and one of the robbers personating the indorsee, presents the bill, and receives payment from the accepter, before notice of the accident could be sent to him. Following the authority of Scaccia, Pothier decides, that the accepter is not discharged by this payment, seeing that it was made to a person not authorised to receive it, without any blame being imputable to the true proprietor; and that the accepter ought not to have paid the bill to one whom he did not know, without a reference, which might have enabled him to ascertain, that he who presented it was the identical person to whom it was indorsed, and entitled to apply for payment.[o] It is doubtful how far this doctrine would be admitted in this country, where bills are exposed to no latent exceptions, or claims of revindication. We have already seen, that the accepter of a bill that has been falsified, is liable for any augmentation of the sum which his own negligence or oversight may have led to, or been the occasion of;[p] and that the onerous indorsee of a bill which had been lost, was entitled to recover payment from the drawer, though a second bill drawn by him, of the same tenor and date, had

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[o] Poth. Part I. ch. vi. n. 168, 169 [p] Ch. iii. p. 96-8.

been already paid, upon the general ground that there is no *rei vindicatio* in bills or bank notes.[q] The principle of this decision seems to establish, that *bona fide* payment by an accepter to the holder of a bill, must in all cases liberate the accepter.[r] The arguments, however, stated by Pothier on the point he has instanced, are certainly strong, and are founded upon principles deduced from a code of laws which professes to make general equity its basis.[s] But betwixt the

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[q] Ch. v. p. 156.

[s] Good *v.* Cole, 4. Durnf. & East, Rep. 825.

It does not appear to the editor, that the author's objections to the opinion of Pothier, in the case supposed by that author, are well founded, or that the cases referred to as analogous are inconsistent with it. It has been already stated to be fixed law, *sup.* p. 156, note, that bills blank indorsed are construed to be the same as bills payable to the *bearer*, and are transferable merely by delivery. It is also fixed law, that a person is bound to indemnify others for loss occasioned by his fault or negligence. Bell's Comm. I. 303. The case referred to in the text, in which the drawer of a bill, which had been lost, was found liable to pay a second time to an innocent and onerous indorsee, falls under the first of these rules. That of the augmentation of the sum, by filling up blanks carelessly left in the bill, falls under the second. The case stated by Pothier supposes the bill to have had a *full* indorsement by the payee to his correspondent, in which situation a bill cannot be passed to another person, without an express indorsement or conveyance under the indorsee's hand. Bayley, 107.—Chitty, 149. This case, therefore, falls under the rule of law, that in order to discharge a debtor, payment must be made to the creditor himself, or to one having a mandate, express or implied, from him for that purpose. Coore *v.* Calloway, 1 Esp. Rep. 115. The debtor in such a bill is not at liberty to pay to any one who presents it. It does not follow as a matter of course, that the possessor is empowered by the holder to receive payment of it; but the debtor must see that he is possessed of sufficient authority, and it lies on him to prove that he was.

The case mentioned by Pothier is thus governed, by a principle quite different from those applicable to the cases referred to

case illustrated by him, and that where a bill has been lost or stolen, there is evidently a material difference; for, in the latter, a degree of negligence or blame may always be attributable to the holder, which will and ought to operate in favour of the payer.[t]

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in the text. At the same time, the possession of the bill will, in ordinary cases, afford a strong presumption, that the person having it in his custody is authorised to receive payment, and this without the necessity of his being the habitual agent of the creditor. Chitty, 281.

[t] A person, says Boucher, called upon a banker with twenty or thirty thousand francs, which he paid to him, and received bills of exchange on a particular place for the amount, and requested the banker to give immediate advice to his correspondent there, on whom the bills were drawn. It was post-day when the drafts were delivered, and the banker accordingly advised his correspondent that day. The holder of the drafts, who was a dexterous sharper, instantly carried them to his lodgings, and copied them so exactly, that, on returning to the bank, and pretending to the banker, that certain circumstances had occurred which obliged him to change his intended projects, and requesting that he would take back the bills and re-deliver his money, the banker, without testifying any distrust, took the copies for the originals, and restored the money he had received. On this, the sharper immediately set off by post, and had the bills presented, and paid, before the counter-order of the drawer arrived. Was this payment on the part of the drawee good? Having really paid to him, to whom his mandate directed him to pay, he did nothing more than execute the order with which he was charged, and, of course, he ought not to sustain the loss. Had the sharper, in place of presenting the true, presented the forged bills, and the drawee paid them, would this have been deemed a valid payment, so as to have discharged him? This question is not without difficulty. Boucher is inclined to think, that the loss should in that case fall on the drawee, as being wanting in vigilance or intelligence in paying counterfeit bills, and ought therefore to suffer for his unskilfulness. This opinion does not appear to be altogether correct. The drawee was certainly led to pay, not only by the bills being presented, but by a genuine letter of advice from the drawer, informing him that bills of such a description had been drawn upon him. This was enough to throw him off his guard, and to divest him of any suspicion of the bills being forged, especially as the forgery was so

When a note payable to the bearer, or a bill blank indorsed, is lost, the person liable is not obliged to make payment to him to whom it was granted, unless the authority of a judge be interposed, and security given by the receiver to relieve the payer from all loss.[u] Payment of lost bill.

Payment of a forged bill will not affect the parties whose names have been forged.[v] But in England it has been decided, that even a proof of the forgery of the drawer's hand-writing, is no defence for the accepter or indorser, in an action at the suit of a *bona fide* holder, if the defendant accepted or indorsed the bill, after the drawer's name was subscribed. If, however, the acceptance or indorsement was made without sight of Forged bill.

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artfully done, as to have at first deceived the drawer himself. It was the imprudence of the drawer in writing the letter of advice, and afterwards restoring the money, before he had time to countermand his letter, that was one principal cause of the loss; which ought properly therefore to be borne by him, and not by the correspondent, whom he had contributed to deceive.—A.

[u] Boucher, p. 224. Forbes, 156.—In England, the holder of a bill, which has been lost, cannot recover its amount from the other parties, even though he offer an indemnity, unless the bill was in such a situation (for instance, having a full indorsation) as that no one could recover on it but himself; or unless the holder can prove, that it has been destroyed. Bayley, 297.—As stated in the text, this is not the case in Scotland.

[v] Poth. n. 103. Beawes, n. 184. Forbes, 154. See 1748, Christies *a.* Fairholms, Kilker. (Fraud), n. 3. p. 216. Mor. 4896.—If, however, a person have given currency to forged acceptances in his name, he will not be allowed to set up the defence of forgery, against the claim of a *bona fide* indorsee. Bell's Comm. I. 302. In Provan *v.* Gray, 29th June, 1821, Shaw's Reports, I. 92, a neglect to plead forgery in an inferior court, was held sufficient to preclude its being stated in the Court of Session. The same is the law in England, Leach *v.* Buchanan, 4 Esp. 226, in which case a single acknowledgment was held to preclude an accepter from pleading this defence.

the bill, it is incumbent on the plaintiff to prove the drawer's hand-writing, as evidence of the instrument having been made.[w]

Fictitious signature.

If, for the purpose of receiving payment, a person indorses a bill with a *fictitious* name, it is forgery, even though the indorsement be not absolutely necessary for obtaining payment.[x]

When payable to joint payees.

When a bill is payable to two or more jointly, each of them has a right to a proportional part only; but if it be payable to them conjunctly and severally, that is, to them or either of them, any one has a power to receive payment of the whole, and to discharge the bill, unless the accepter be interpelled by some of the others.[y]

Payment before bill is due, &c.

As the conditions of time and place are of im-

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[w] Chitty, p. 377. Kyd, 204.

[x] Manning, p. 33. One Edward Tuft, having got hold of a bill, the property of Weitherall, out of whose pocket it had been picked or lost, bought a horse, and, in payment of the price, offered this bill to change. The seller, not having sufficient cash, carried it to a banker, one of whose clerks told him it was very good paper, and that if he would put his name on the back of it, he would discount it. This, however, the seller declined; but told the clerk, that the gentleman from whom he had received it was at hand, and would indorse it; and that he would go and fetch him. He accordingly returned with Tuft; and the clerk having told him, that it was the rule of their shop never to take a discount-bill, unless the person offering it made an indorsement, and therefore, if he would indorse the bill, it should be discounted; Tuft, on this, indorsed it by the name of *John Williams*, and the banker's clerk gave him the cash for it. The judges were unanimously of opinion that this was forgery. See *sup.* p. 157-8.

A banking-company is not obliged to pay value for forgeries committed against them; and they are entitled, when a forged note is presented, to stop its further progress, by putting a mark upon it, certifying that it is forged. 1768, Borland *a.* Thistle Bank, Dict. 3. 47. Mor. 877.—A.

[y] Forbes, p. 155. See ch. ii. p. 50.

portance to all the parties of a bill,[z] no bill ought to be paid before it is due; and if payment be made before that time to a person who becomes afterwards insolvent, the accepter may, in some cases, be obliged to pay it again.[a] And as the holder cannot demand payment before the bill is due, neither can the accepter compel him to receive payment till then.[b] Where there is a place of payment mentioned in the bill, the holder is not obliged to accept of his money anywhere else;[c] and if the place of payment be alternative, it is in the option of the accepter where to pay.[d] If the holder refuse to receive payment when the bill falls due, the accepter ought to offer the money under form of instrument, and consign it in some responsible public office, which will free him from interest and damages;[e] and it is said that, after such offer, whether the money be consigned or not, he will be relieved of interest.[f] In such cases, however, consignation is always advisable.[g] The holder is not

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[z] Poth. n. 173.

[a] Molloy, b. 2. c. 10. § 32. Malyne, obs. 10. Bayley, 260. See *sup.* p. 167, note [n]. It is held in England, that payment of a bill before it is due, if to a person not the true proprietor, will not free the accepter. Chitty, 281.

[b] Boucher, n. 1165.

[c] Poth. 173. 187.

[d] Forbes, p. 144. This is questionable; payment must be made at the place at which the holder makes presentment; and he has the privilege of choosing either of the places of payment for this purpose. See *sup.* p. 165, note [i].

[e] Forbes, p. 147. Poth. n. 173. Dupuis, ch. xii. n. 10.

[f] Ibid. p. 148. 1703, Boick *a.* Blackwood.

[g] Ersk. b. 3. t. 4. § 5.

obliged to receive payment, either from the accepter or any third party, after the last day of grace, if the bill has been sent away with notice of the dishonour, or if he have redrawn for the value.[h]

Effect of payment.

The effect of payment is to extinguish the bill if the whole be paid, or to diminish its amount in the case of partial payment. Partial payments, indefinitely made by the accepter of several bills that are due, ought to be applied by the holder in extinction of the interest in the first instance, if any interest be due, and next in extinction or diminution of that sum, which would be soonest lost by prescription, without the aid of such application.[i] A partial payment of a

Partial payments.

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[h] Scarlett, c. 19. R. 10.

[i] Ersk. b. 3. t. 4. § 2. Where there are several debts due by one person to the same creditor, some of which are also secured by other obligants, the creditor, on the principal debtor's bankruptcy, must apply indefinite payments made before it, in extinction of the different debts equally. Ersk. ib. Mr Bell, however, seems to be of opinion, that this rule does not apply to the case of bills, and that the holder will be entitled to ascribe the payments to the extinction of such of the bills as he thinks proper. Comm. I. 333-4. Chitty, 289.

In Cowan and Sons *v.* Hurry and others, 19th December 1816, Fac. Coll. the accepters of a bill suspended a threatened charge, on the grounds, that the bill in question was an accommodation for the drawer's benefit, and that they were entitled, before paying it, to an assignation to a proportional part of an heritable bond, which the holders possessed in security of their general balance. The Court ultimately refused the bill, because "the suspending a charge on an accepted bill by an onerous indorsee, upon a claim by the party paying it for an assignation of a security for a general balance, held by the indorsee against another debtor in the bill, even a prior debtor, was without authority or precedent, and would destroy the currency of bills; and that this held more particularly in the pre-

bill of exchange may be taken, if the bill be protested for the remainder, and the other parties advised of it, because by such payment the debt is so far diminished.[k] But in England, if the holder take less than the whole sum, without the consent of the other parties, it is said they will be liberated from their obligation, although the holder has given due notice of the partial dishonour, on the ground that the holder has thereby made an election to look for his money from the accepter.[l] This seems unreasonable; and, indeed, is contrary to the opinion expressed by the House of Lords, in the appealed case, Hodgson & Donaldson *a.* Bushby, 1782, where a receipt by the holder for a partial payment from the accepter, after a protest for non-pay-

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sent case, where the party demanding the assignation was, *ex facie* of the bill, the primary debtor, and proposed to establish, by extrinsic evidence, that another party to the bill was truly the primary debtor; that a charge on a bill by an onerous indorsee could not be suspended on an allegation, that it was accepted without value; that in a question of payment of a bill, nothing can be believed, except what appears *ex facie* of it; and that any claims which the different obligants may have against each other, must be settled by a separate action afterwards."

The drawer of a bill, who is obliged to pay it to the holder, is not entitled to pursue for relief against a messenger, who had been employed by the holder to execute a caption against the accepter, but who had done his duty improperly, the holder not having himself made any complaint against the messenger. Steel *v.* Grant, 9th June 1814, Fac. Coll.

[k] Mar. p. 68. 86. Scarlett, ch. 17. Boucher.

[l] Lord Raymond's Rep. v. i. p. 743.

This is not now law in England; the holder is at liberty to receive a partial payment from the accepter or any of the other parties on the bill, without injuring his claim for the balance against any of them, Chitty, 297. Walwyn *v.* St Quintin, 1 Bos. and Pul. 652.

ment, was found not to liberate the drawer and indorsers, and was treated as a circumstance entirely immaterial.[m] But if the holder of a bill for value, compounds with an accepter without the consent of the other parties, he forfeits his right of recourse against them, upon very just principles; for taking a sum in part payment is a very different thing from accepting of a certain sum of money in complete satisfaction of the debt, which would deprive all the other parties of the right of resorting to him afterwards.[n]

Taking composition, and prorogating of time.

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[m] Fac. Coll. No 56, p. 88. and No 73, p. 112. Mor. 1608.—12th May, 1783, Journals of the House of Lords.

[n] This applies only to a discharge of the accepter under a *private* composition-contract. It is settled, that the taking of a composition, proposed under the *bankrupt statute*, from a principal debtor, does not discharge the cautioner, (Bell's Comm. II. 503,) and there seems to be no reason to make a distinction, on this point, between the case of these parties and that of the different obligants on bills. A holder is, without doubt, safe in taking the composition from the accepter, when it has been carried through by the other creditors, without his concurrence. If his concurrence be asked, and he think the offer reasonable, he ought, before signifying his assent, to intimate his intention to the other obligants, that they may have an opportunity of stating their objections to the offer. If the objections stated appear to him not to be well founded, he ought, before assenting to the offer, to require the other obligants to pay the debt themselves, so that they may prosecute their relief against the bankrupt according to their own views. Failing their making payment, the holder is at liberty to act according to the best of his discretion, in accepting or refusing the offer of composition. Bell's Comm. *ib.*

But it has farther been decided, that a creditor's active concurrence in an offer of composition by the principal debtor, though without giving notice of his having so concurred to a cautioner, does not free the latter. Whitelaw and Kirk *v.* Steins, 20th May 1814. Fac. Coll. In this case, Whitelaw and Kirk had granted a letter of guarantee to the Steins for the price of whisky to be furnished by them to John Small. Both Small,

In the same manner, the receiving of a bond, or any other security in satisfaction of a bill, ought to operate as a discharge to the other parties, if they have not consented to the measure.[o] But

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and Whitelaw & Kirk failed, and the Steins accepted of a composition of 2s. in the pound on the price of the whisky furnished, offered by the latter. After the first instalment of this composition was paid, W. & K. learned that the Steins had agreed to a composition of 6s. per pound offered by Small, without having asked their assent, and on that ground they suspended a charge for payment of the remainder of their composition. But the Court found that the Steins, by what they had done, had not lost their claim upon the cautioners. Lord Meadowbank, who stated the opinion of the majority of the Court, placed the decision on this ground,—that the statute having conferred on a creditor the free and discretionary power of assenting to a composition, neither a cautioner nor the Court is entitled to canvass the motives by which the creditor has been guided. Mr Bell, *ib.* note [1], thinks that the judgment stands entirely on another principle, viz. "that the co-obligants must either pay the debt, and take their own relief, or must be held to have given up their discretionary power of doing the best for payment, to the principal creditor." A prudent creditor will take care to avoid questions of this kind, by communicating with the other obligants, before assenting to an offer of composition.

The concurrence in a *discharge* to the bankrupt is considered by Mr Bell, Comm. II. 469, to be in a different situation from the assent to a composition, because it is a gratuitous interference with the co-obligant's right of relief; and the assent of the co-obligants ought therefore to be obtained to this step.

[o] Chitty, 292. This will not happen unless additional time is given by the holder to the accepter, or any of the other obligants, by the terms of the new security, which, it is held, the holder is not entitled to give, to the prejudice of the other parties, and without their consent. It was so decided in Flower *v.* Pringle, 18th Dec. 1729, Mor. 1560, in which, among other objections by a drawer to an action of recourse against him, he alleged, "that the possessor of the bill had voluntarily prorogated the term of payment to the accepter, by drawing a new bill on him for a larger sum, (including the bill in question, after it had been protested), payable at 30 days' sight, by which he had innovated the debt, and renounced recourse against the drawer." The Court sustained the defence, "that the pursuers did not duly intimate to the defender, the non-payment and protesting of the defender's draft on Scott; and also *sustained the other defence*, that the pursuer had drawn a new bill for a greater sum, wherein it was acknow-

if the bill has been duly negotiated, an assignation to an infeftment, taken by the holder in security, will not bar his action of recourse once established by the due negotiation.[p]

Payment in foreign coin and by draft.

When a foreign bill is drawn, payable in a foreign country in foreign coin, the value of

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ledged the smaller sum was included, and had prorogated the term for paying the said last bill, beyond the term at which the first bill was payable, and found he had thereby lost his action of recourse." The principle on which this rule is founded (as stated by Bayley, J. in Claridge *v.* Dalton, 4 M. & S. 232,) is, "that the holder, by entering into a binding engagement to give time to the accepter, renders him less active in endeavouring to satisfy the bill than he probably would otherwise be, if he continued liable to an immediate action at the suit of the holder; besides, if a holder agree to give indulgence for a certain period of time to any one of the parties to a bill, this takes away his right to call on that party for payment before the period expires, and not only to call upon him, but on all the intermediate parties; for otherwise, if he were to oblige them to pay the bill, they could immediately resort against the very person whom the holder has indulged, which would be inconsistent with his agreement."

It follows therefore, 1. That additional documents or securities may be safely taken from any of the parties, provided no additional time for payment is stipulated.—Chitty, 297. 2. A mere neglect to pursue active measures for recovering payment is of no consequence. Nicolson *v.* Morrison, post. note [p]. An agreement to give time to one of the parties can be pleaded on only by those who would have had a claim against that party, had they been compelled to pay the bill; for instance, such indulgence to an indorser will free all posterior indorsers, but will not free any of the prior parties, Chitty 298; nor will such indulgence to one of several accepters free the rest. *Ibid.* 293. But where the bill was known to the holder to be an accommodation for the benefit of the party, to whom indulgence is given, this may free the prior parties. Bayley, 273.

An agreement merely, "*not to press the accepter*," was however held not to discharge the drawer. Walwyn *v.* St Quintin, 1 Bos. and Pul. 652. An obligant on a bill may lose the benefit of an objection on this ground, by expressly departing from it, after he was aware of its existence. Stevens *v.* Lynch, 12 East, 38. And he is not entitled to found upon it, if the bill was an accommodation for his own benefit. Collott *v.* Haigh, 3 Camp. 281.

[p] 1711, Nicolson *a.* Morison, Dict. v. 1. p. 101. Mor. 1552.

which is depreciated by the government of that country, the bill is payable according to the value of the money at the time it was drawn.[q] When payment is made by a draft on a banker, if the person receiving the draft does not use due diligence to get it paid, the person from whom he received it will be discharged,—but not otherwise, unless the holder expressly agreed to run all risks; and in England it has been decided, that the act of writiug a receipt in full will not be evidence of such an agreement.[r] The safest plan, undoubtedly, is not to part with the bill till the draft be paid.[s] A bill or note was granted for the price of rigging a ship; the granter afterwards drew a draft for the amount, payable to the creditor to whom he had granted the bill. The creditor, finding little chance of getting payment of the draft, pursued his debtor in the original bill or note, and an action was sustained on it.[t] A draft, given by an accepter on another person, in payment of a bill which

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[q] Chitty, 286.

[r] Chitty, 287. It was, however, since decided, that a banker having a bill remitted to him to present for payment, was justified in giving it up on receiving a check for the amount on another banker, although the check was dishonoured. 6 T. R. 12.—Manning, p. 92.—A.

But this was departed from in a subsequent case, in which Lord Ellenborough held, that the drawer and indorsers would be discharged, if the check was not paid, because they have a right to insist on the production of the bill, and to have it delivered up to them on payment.—Chitty, *ibid.*

[s] Mar. p. 21. If, by delay arising from the non-payment of the draft, the dishonour of the bill is not intimated to the drawer and indorsers in due time, it does not appear how an objection on this ground, on their part, could be answered by the holder.

[t] Oswald *a.* Gordon, Forbes, Dec. 511. Mor 11,521.

was delivered up to him, does not prevent recourse upon him as drawer of the draft, if it be duly negotiated and not paid.[u]

Receipt on bill.

On payment, the bill is generally delivered up; but it is not well ascertained whether the person paying can insist for a separate receipt or not. It appears but just, however, that a receipt on the bill, which needs no stamp,[v] should be given, if demanded. When the bill is paid by an indorser, it is necessary that he have a receipt, to enable him to operate his recourse against the accepter and previous indorsers; which receipt is usually taken on the protest, and entitles him to registrate the protest, and to proceed with diligence in his own name.[w] A bill, having upon it a receipt for payment in general, is presumed to have been paid by the accepter.

Case of Ferguson *v.* Young.

Young accepted a bill drawn by R. Steel & Co., payable one hundred days after date, which the drawers afterwards discounted with the Falkirk Banking Company. When it became due, it was retired by T. Steel, one of the partners of Steel & Co., who took a receipt from the cashier of the Bank in these terms:—" Received pay-

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[u] 1715, Johnston *a.* Murray, Bruce, No 48, p. 61. Mor. 1556. Money transmitted by a debtor, at the request of the creditor, through the post-office, is at the risk of the latter, provided the former establishes, satisfactorily, that the letter was put into the post-office. Cuming *v.* Marshall, 21st Dec. 1752, Mor. 10,095. The officers of the post-office are not responsible for money abstracted from letters, where no blame is imputable to them as individuals. Farries *v.* Elder, &c. 21st June 1799, Mor. 10,103.

[v] 23d Geo. III. c. 49, § 4, 7. 44th Geo. III. c. 98, § 2, 8. 55 Geo. III. c. 184. Schedule, part 1, *tit.* Receipts.

[w] 12th Geo. III. c. 72, § 43. See ch. x.

ment of the within." T. Steel died soon after; and the retired bill having been found in his repositories, it was assigned by R. Steel, his partner, to Ferguson, in security of a company debt. Ferguson raised an action for payment against Young, the accepter, who pleaded, that he had put into the hands of T. Steel the money with which he had retired the bill; and, in support of this allegation, he founded on the nature of the receipt granted by the Bank, contending, that wherever a bill appears with a receipt on the back of it in general terms, not mentioning by whom it was paid, the presumption of law is, that it had been retired by the accepter, the proper debtor, or at least with his money. The Court sustained the defence.[x]

But, as has been already mentioned, separate receipts for partial payments of a bill, will not militate against a person, to whom the bill is afterwards indorsed.[y]

Effects of payment on the rights of the parties.

Payment, when made by the accepter, extinguishes his obligation to the drawer, and the drawer's obligation to the payee. If the accepter was indebted to the drawer, the payment affords him a good ground of compensation, or set-off, against that debt; if he was not, he has an action against the drawer *ex mandato*,[z] for re-payment of the sum advanced by him on the drawer's ac-

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[x] 1793, Ferguson *a.* Young, Fac. Coll. No 80, p. 175. Mor. 1488. Chitty, 304.

[y] 1714, Fairholm *a.* Cockburn, Mor. 1506.

[z] Stair, b. 1. t, 11. § 7.—Poth. n. 161. 97. When an accepter founds on a bill in his hands as having been retired by him, he must be prepared to prove, if required, and if there is no receipt

count, besides a reward for his trouble, which is called commission-money.[a] One of the accepters of a bill having paid the amount, was found entitled to re-payment from the drawer, though the latter alleged that he never meant to draw upon him, his name having been got added to the bill by the other accepter without his knowledge.[b] With regard to all the other parties, the accepter is considered as the original debtor, and the holder is in all cases entitled to insist against him in the first instance. Where the bill does not expressly bear value in the hands of the drawee, a presumption seems to be received by our practice that he is not the drawer's debtor, and consequently an action of recourse is competent to him against the drawer for repayment;[c] where it does bear value in his hands, the pre-

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on it by the holder, that it was at one time actually in circulation after acceptance. Pfiel *v.* Vanbatenberg, 2 Camp. 439. Action by accepter, on the ground of having accepted and paid several bills for defendant's accommodation—bills produced by plaintiff receipted in the usual way (without signature). Lord Ellenborough held it must be shown, that the bills were once in circulation after acceptance. They might have been left for acceptance, and accepter refused to return them, and the receipts made no difference, unless shown to be in the hand-writing of defendant. Not till bills proved out of plaintiff's possession accepted, it would be presumed they had been got back by payment.

[a] Ersk. b. 3. t. 2. § 30.—Poth. n. 86, 87. After a bill has been paid by the accepter, it is for ever extinguished as a voucher of debt, and if it should be attempted to put it again into circulation, it will be a nullity in the hands of the receiver. Chitty, 130. The last stamp act, § 19, imposes, besides, a penalty upon the receivers of such bills. See also p. 153, note.

[b] 1712, Wilson *a.* Mackenzie, D. Forbes, p. 512. Mor. 1481 and 1531.

[c] 1711, Cunningham *a.* Agnew, Dict. v. 1. p. 99. Mor. 1531. Wilson *a.* MacKenzie, *ibid.* See sup. p. 123.

sumption thence arising can only be removed by the writ or oath of the drawer.[d] Where a bill is accepted and paid, for or upon account of a third person, no action of recourse lies against the drawer at the instance of him who made the payment; as, by accepting the bill, he followed the faith and credit, not of the drawer, but of the person for or upon whose account it was drawn.[e] Few persons drawn upon, who are not in the possession of the drawer's funds, venture to accept and pay a bill, till they have suffered it to be protested against themselves for non-acceptance, after which they may safely accept and pay, *supra* protest, for the honour of the drawer; which preserves their right of recourse free from challenge.

Payment *supra* protest.

Payment *supra* protest, may be made not only by the persons mentioned in the bill, but by any other person, in honour of the drawer or the indorsers. He who pays a bill of exchange *supra* protest, acts for the benefit of all concerned, and therefore, has not only an action against the person for whose honour he paid, but is entitled, *jure singulari*, to an action against all the other parties who are liable to that person.[f]

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[d] 1793, Wallace *a.* Barrie, Fac. Coll. No 79, p. 174. Mor. 1484. See also Arthur *a.* Oldcorn, 1717, Bruce, No 51, p. 69. Mor. 1482. See p. 77, note [x].

[e] Poth. n. 105. Beawes, n. 124.

[f] Sav. tom. 2. ch. ix. § 10. Poth. n. 171. Beawes, n. 48. 54. Mar. 128. But his claim will be subject to all the objections which were competent against the party for whose honour he pays. Bayley, 263. Thus, if the first accepter had no funds of the drawer, this plea will be available to him, against the person paying *supra* protest, for the drawer's honour. *Ex parte* Lambert, 13 Vesey, 179.

After a bill has been accepted simply, the accepter cannot pay in honour of an indorser, because he is already bound to him; but if he has accepted without having effects of the drawer in his hands, he may suffer the bill to be protested, and then pay *supra* protest,[g] so as to secure his recourse against the drawer. No person should pay in honour of another, before the bill has been protested for non-payment; in which protest, or in a separate instrument, must be expressed for whose honour he has paid, and the nature and quality of the payment, otherwise recourse will be lost against him for whom payment was made.[h] If, however, an accepter *supra* protest, for the honour of the drawer or indorser, receives his approbation of the acceptance, he may freely pay the bill without a protest for non-payment.[i] He who pays a bill *supra* protest, is bound to give the same timely notification of the dishonour to the other parties, as

Payment *supra* protest.

Notice by payer.

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[g] Beawes, n. 51. Chitty, 320. Sav. tom. 2. ch. ix. § 11. Poth. n. 114.

[h] Beawes, n. 53. Mar. 128. 1703, Carstairs *a.* Paton, Dalrymple, No 40. p. 51. Mor. 1528. Poth. n. 114. *contra.*

[i] Beawes, n. 48. Chitty, 321. In Hoare and another *v.* Cazenove and another, 16 East, 391, it appeared that acceptance by the drawees had been refused, but the bills had been afterwards accepted by defendant, for the honour of the first indorsers. The accepter defended this action on the ground that there had been no presentment for payment, and protest, against the original drawees. The Court of King's Bench sustained this defence, on the ground that the obligation of an acceptor *supra* protest is conditional, and that there was a chance that funds might have come into the hands of the original drawees, before the time of payment.

When a bill has been accepted *supra* protest, it is unnecessary for the accepters also to pay it *supra* protest. Forbes, 151-2.

the holder is in other cases;[k] for, were not the same strictness of negotiation observed, the person for whose honour he paid would be in a worse situation than if he had not at all interfered.[l] If, as already observed, payment be made for the honour of the drawer, the person paying has relief against him, but not against the indorsers; if, for the honour of an indorser, he has relief not only against that indorser, but against all the previous indorsers, but not against subsequent ones.[m]

Payment *supra* protest.

When payment of a bill is made, the document is usually delivered up to the debtor, or to the person by whom it has been paid; and as long as it remains in the creditor's custody, it is presumed unpaid. A bill with a receipt for the contents, written and subscribed by the creditor, and found among his papers after his death, will not exoner the debtor; because, in law, the receipt is presumed to have been written with the expectation of payment, *spe numerandæ pecuniæ;* and, not being delivered, the presumption is, that it was not paid.[n] Payment, however, may, in certain cases, be presumed from circumstances, though the bill be unretired.

Presumptions of payment.

Fraser granted a promissory-note to Boog, who

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[k] 1743, Ochterlony *a.* Hunter, Dict. v. 3. p. 89. Mor. 1567.

[l] Poth. n. 114. Sav. tom. 2. ch. ix. Max. 3.

[m] Beawes, n. 57. Sav. *ibid.* Kyd, p. 155.

[n] 1709, Cochrane *a.* Pringle, Dict. v. 2. p. 269. Mor. 12,714.

lived five years and ten months after its date in 1780, without having made any claim upon it. Action, however, was raised by Russell and other trustees of the heir of Boog. The defender stated a variety of circumstances, from which it appeared that the debt was already paid; and the Court found, there was sufficient presumptive evidence, that the note had been paid or accounted for by the defender to Boog.[o]

Prior to the introduction of the statute of limitation, payment of an old bill bearing to be for rent of land, was presumed, from three consecutive discharges of rent in a posterior tack having been granted, the last of which discharged all precedings.[p] When a bill accepted by two persons is retired with a blank indorsation, and is afterwards found in the custody of one of them, the presumption is, that both have contributed equally to the payment.[q]

Remedy in case of erroneous payment.

It may be here proper to observe, that when payment of a debt not truly due, is made by a person, either through mistake or ignorance, he is entitled to an action against the receiver for repayment. And as the right to this action is founded on equity, redress is competent, whether the payment arose from a mistake in point of fact, or in the law with regard to it.[r] Thus,

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[o] 1788, Russell, &c. *a.* Fraser, Fac. Coll. No 21, p. 36. Mor. 11,390.

[p] 1744, Kames *a.* Anderson, Dict. v. 4. p. 120.

[q] 1728, Campbell *a.* Cockburn, Dict. v. 2. p. 152, Mor. 11534.

[r] Ersk. b. 3. t. 3. § 54.

a cautioner in a bond having paid the debt, and next day discovered that he had become free, by the lapse of the seven years, to which cautionary obligations are limited by the act 1695, c. 5; he was found entitled to repetition (repayment) from the creditor;[s] and in a judicial ranking and sale, a creditor who had obtained a total preference, was found liable to repetition, upon its being afterwards discovered that, as to a certain part of the debtor's lands, his security was null.[t] Upon the same principle, if a person under a misapprehension of facts, or of the law arising out of them, has paid a bill which he was under no obligation to pay; as, for instance, where the party to whom he paid had been guilty of neglect in negotiation, which, had the bill not been paid, might have been a good ground of refusing payment, he will be entitled to recover the sum so paid upon an action of *condictio indebiti*.[u]

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[s] 1778, Carrick *a.* Carse, Fac. Coll. No 41, p. 70. Mor. 2931.

[t] 1792, Keith *a.* Grant, &c. *Ibid.* No 1. p. 1. Mor. 2933.

[u] 1792, Batchin *a.* Orr, Dict. v. 3. p. 87. Mor. 1619. But in these circumstances, the person making the erroneous payment will have no claim for indemnification against any one, but him to whom he made the payment. See Roscoe *v.* Hardy, quoted in ch. viii. (See List of Cases.)

# CHAP. VII.

## OF PROTESTS.

Necessity and nature of protests.

WHEN a bill of exchange is presented for acceptance, or payment, and refused, it ought immediately to be put into the hands of a notary-public, and protested, and intimation of the dishonour given to the drawer and indorsers, which secures the holder's right of recourse against them. The protest is a formal step of diligence which cannot be dispensed with, or the want of it supplied by witnesses or oath of party, or any other act.[a] It ascertains that no improper delay

[a] Stair, b. 1. tit. 11. § 7.—Sav. tom. 1. liv. 3. ch. vi.—Edit de Commerce, tit. 5. art. 10.

It has been already stated, that if a bill is on an improper stamp, a neglect of the rules of negotiation will not injure any claim, which the holder has against the other parties, independent of the instrument. In what cases want of funds in the accepter's hands will excuse the omission of a protest, see ch. VIII. But it is not safe to omit the protest of a *foreign* bill in any case, because it may be doubtful how far a foreign court will admit the exceptions, which are allowed in this country. Chitty, 216.

In England, a protest is not absolutely necessary on the non-acceptance or non-payment of an inland bill or promissory-note, which arises from a difference between them and foreign bills at common law. The latter being regulated by the custom of merchants, a protest has always been considered necessary to entitle

took place in negotiating the bill; that it was duly presented by the holder; that acceptance, or payment, was refused; and that the holder reserves his right of operating relief against the other parties concerned. Protesting is not necessary to entitle the creditor to an action upon an accepted bill against the accepter, as the accepter has nothing to do with the negotiation of a bill, and action is always competent against him, whether it be protested or not;[b] but without that formality, the holder cannot have the benefit of summary diligence.[c]

Form of protest.

Protests vary in their form in different countries, but they should always be conformable to the custom of the country where they are made, and executed according to the laws and usages

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the holder to recourse against the drawer and indorsers. It was held, on the other hand, that inland bills could not be protested at common law; simple notice of dishonour only was required. But it was at the same time a rule of the common law, that, without a protest, nothing could be recovered on bills of any description, except the principal sum. The statutes 3 and 4 Anne, c. 9, § 4, and 9 and 10. W. III. c. 17, to remedy this defect, allowed a protest on the non-acceptance or non-payment of inland bills, which were for the sum of L.5 or upwards, and were payable within a limited period after date, and expressed value received, on notice of which protest being given, the holder was entitled to recover principal, interest, and charges. It is still, however, optional to the holder to protest or not, as he chooses, and the want of a protest does not injure his claim for the principal sum.

In Scotland, no difference has ever been observed between foreign and inland bills in this respect, protest being equally necessary to entitle the holder of either to pursue recourse against the drawer and indorsers, even for the principal sum. Ferguson & Co. *v.* Belsh, 17th June 1803, Mor. App. to Bills, No 13.

[b] Molloy, b. 2. c. 10. § 17. 31.

[c] See ch. x.

there practised.[d] In this country, a protest, in order to its being received in evidence, must be written on paper stamped with a proper stamp, the amount of which at present is three shillings, by the 44. Geo. III. c. 98. § 8.[e]

Stamp.

In every protest, the bill, and all the indorsements, if there be any, must be transcribed *verbatim*, and prefixed to the instrument, and the reasons specified why the bill was dishonoured or protested.[f] All bills ought to be protested for non-payment on the last day of grace, if they are not duly paid. A bill cannot be protested against the accepter on the day of payment;[g] but the protest must be taken within the three days of grace;[h] and where a bill was protested on the day after the last day of grace, recourse was refused, though no damage could be said to have arisen by delaying the protest.[i] When the last

When protest to be made.

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[d] Poth. n. 155.—Boucher, n. 1463.

[e] For the form of Protests, and of the Acceptance *supra* protest, see Appendix. By 55 Geo. III. ch. 184, schedule, part I. the following stamp-duties are substituted for that mentioned in the text:—

Protest of any bill of exchange or promissory-note, for any sum of money

| | | | |
|---|---|---|---|
| Not amounting to L.20, | L.0 | 2 | 0 |
| Amounting to L.20, and not amounting to L.100, | 0 | 3 | 0 |
| ——— L.100, ——— L.500, | 0 | 5 | 0 |
| ——— L.500, or upwards, | 0 | 10 | 0 |

[f] Act 1681.—Ord. de Com. tit. 5. art. 9. It is not customary in Scotland to state the reason of refusal. The statute requires only the prefixing of the bill.

[g] 1788, Charles *a.* Skirving, &c. Dict. v. 3. p. 84. Mor. 1614.

[h] 1751, Cruickshanks *a.* Mitchell, *ibid.* p. 83.—1576.

[i] 1758, Tod *a.* Maxwell, Fac. Coll. No 123. p. 228.—1583.—1731, Mackenzie *a.* Urquhart, Dict. v. 1. p. 100.—1561. The same was also decided in British Linen Co. *v.* Hepburn, 19th

day of grace happens to be Sunday, the bill must be protested on the day preceding; and a bill protested on the day following was found not duly negotiated.[k]

When a bill of exchange is, by contrary winds, or any other accident, detained so long on the way, that the time of payment is expired, the holder ought, immediately on its arrival, to demand payment from the drawee, and, in the case of refusal, protest it for non-acceptance.[l] It ap-

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May 1807, in which the notary's clerk presented and noted the bill on the last day of grace, in the notary's absence. He presented it again himself the next day, and made out a protest; but it was found to be too late.

It is laid down by Erskine, B. III. t. 2. § 33, that the protest may be taken on any one of the days of grace, and in the report of Charles *v.* Skirving, *sup.* it is stated, that an opinion to this effect was delivered from the Bench: This is the general understanding in Scotland; but as an accepter is allowed till the last day of grace to pay, it would not be safe to protest the bill till that day, unless, perhaps, when payment has been unequivocally refused by him on one of the other days of grace. In England, presentment for payment and protest on the second day of grace, when the third is not a day of public rest, is a nullity. Wiffen *v.* Roberts, Esp. 261. Bayley, 200.

[k] 1786, Smith & Payne *a.* Laing, Arthur, & Co., Dict. v. 3. p. 83.—Mor. 1612. In this case, the bill was drawn and accepted in London, indorsed to Laing, Arthur, & Co., in Scotland, and afterwards to Smith & Payne of London. In the discussion of a suspension at the instance of Laing, Arthur, & Co., the question turned upon this,—whether the bill was, in a question with the suspenders, to be considered a foreign or an English inland bill, which last requires no protest except to enable the holder to recover interest and charges? The Court, by finding that there had not been due negotiation, decided that the bill was foreign.

In England, a protest for the non-payment of an *inland* bill cannot be made until the day *after* it has become due. Stat. 9 & 10. W. 3. c. 17. § 1.

[l] Molloy, b. 2. c. 10. § 27. The holder's recourse will not be lost in such cases, provided he take these steps without delay,

pears, too, that a bill payable at a day certain, need not be protested till the last day of grace, when a protest for non-payment may at once be taken, without any previous protest for non-acceptance;[m] though, as before observed, a protest for non-acceptance, is, in general, advisable, if not necessary.[n] A protest against the drawer of a bill not accepted, for exchange, re-exchange, cost, damage, and interest, was found equivalent to a protest for not-payment; though no mention was made, in the protest, of non-acceptance or non-payment.[o] It is not likely, however, that

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Bell, I. 325. Chitty, 223. Patience *v.* Townly, 2 Smith, 223, where a bill drawn on Leghorn could not be presented in time, owing to the state of the country; it was held, that the holder might recover, on evidence of the impossibility of presenting the bill at maturity. If a person take a bill on the eve of its becoming due, he is bound to use every diligence to present it to the drawee on the day of payment. Anderton *v.* Beck, 16 East, 248. Plaintiff had received, in Yorkshire, on 26th December, a bill payable in London on 28th. He kept it till the 29th, and then sent it to the Lincoln Bank, who forwarded it to London without delay; and it was presented for payment 2d January, and dishonoured. The Court held, that as plaintiff submitted to take this bill, he was bound to use due diligence in presenting it, and that he was guilty of laches in keeping it from the 26th to the 29th.

[m] 1749, Jamieson *a.* Gillespie, Kilkerr. No 23. p. 87. Mor. 1494 & 1579. But though the holder is under no obligation to present a bill, payable at a time certain, for acceptance, yet if he actually do so, and acceptance is refused, he must protest the bill, and give notice of the dishonour to the other parties, under pain of forfeiting his recourse, Bell's Comm. I. 321. Chitty, 197. Blesard *v.* Hirst, 5 Burr. 2670. Goodall *v.* Dolley, 1 T. R. 712. If the bill remain in the holder's hand till the time of payment, he is not bound, after a previous refusal of acceptance, to make a second presentment to the accepter for payment, and take a new protest, De la Torre *v.* Barclay, 1 Starkie, C. N. P., 7. Chitty, 232. Bell's Comm. I. 657. *addenda.*

[n] Ch. iv. p. 105, *et seq.*

[o] 1699, Yuille *a.* Richardson, Fountainhall, vol. ii. p. 64.

this would be sustained in the present day, when a compliance with the strict rules of negotiation is more rigorously exacted.[p]

By whom and where to be taken.

Protests for non-acceptance may be taken by any person who has the bill in his hand, against the drawee, either at his dwelling-place, or, if he be dead, at the house where he last resided; but protests for non-payment must be taken by the person entitled to receive the money, or by some person duly authorised by him, either at the place of payment, if any place be specified; or, if no place be specified, then in the personal presence of the accepter; or, if he cannot be found, at his ordinary place of residence.[q] And the instrument of protest must be drawn up and extended under the hands of a notary-public.[r]

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[p] A protest was sustained, which did not specify that the bill was presented at the place of payment, but only that it was *duly* presented. Commercial Bank *v.* Hannah, 24th Feb. 1818, Fac. Coll. But when a particular place of payment is mentioned, it is not enough that the protest bear to be taken in the *town*, within which the place of payment is situated. M'Kenzie *v.* Urquhart, 1731, Mor. 1561.

An objection to a protest, that it was taken at the instance of a bank with which the bill had been discounted, and afterwards extended in name of the chargers who had paid it to the bank, was repelled in Mackie & M'Omish *v.* Hilliard & Co., 15th June 1822, Shaw and Dunlop's Reports, I. 499.

[q] The doctrine contained in this passage relates to the persons entitled to present the bill for non-acceptance or non-payment, as to which see ch. iv. and vi. In protesting, a notary-public, authorised by the possessor of the bill, must have been present, or must make a second demand of acceptance or payment, in presence of two witnesses. See note [x].

[r] The notary ought to be an impartial person, not an active partner of a bank holding the bill. Farries *v.* Smith, 9th June 1813, Fac. Coll.

If there be no notary in the place where the bill is disho-

Noting. It is customary, in demanding payment of inland bills or notes, for the notary to make a minute on the bill, of the day, month, and year, and to subscribe his initials; which is called *noting*. But noting, as distinguished from a protest, is unknown in law, and is merely a preliminary step, from which the protest can be afterwards at any time extended. No noting of foreign bills can take place; for the protest must be instantly made out, and transmitted, with notice, and as evidence of the dishonour.[s]

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noured, the protest may in England be made by any substantial person of that place, in the presence of two or more witnesses. Chitty, 217. This practice has never been recognised in Scotland.

[s] It is sufficient to extend the protest on an *inland* bill at any time before a judicial payment is made, Chitty, 218; and the law seems to be the same also with respect to *foreign* bills. Bayley, 217, says, "A foreign bill should be noted for non-acceptance or non-payment, on the day on which acceptance or payment is refused; but it would seem that the protest may be formally drawn up at any future period, provided that, in the event of a suit, it be drawn up before the commencement of such suit." See Chaters *v.* Bell, 4 Esp. N. P. C., 48, in which a foreign bill became due on 24th April, when it was noted for non-payment. The protest was not extended till 14th May, and an action was afterwards brought. Lord Kenyon said, "he was of opinion, that if the bill was regularly presented and noted at the time, the protest might be made at any future period;" and the case coming afterwards before Lord Ellenborough, his Lordship expressed his concurrence.—Brown & Co. *v.* Hutchison Dunbar, 8th December 1807. Mor. App. to Bill, No 21. A bill, drawn and accepted in London, was indorsed to Dunbar of Edinburgh, who indorsed it to Brown & Co. of Leeds. It was returned upon the latter, dishonoured and noted. They immediately intimated the dishonour to Dunbar, and added, that "*not being protested*, we have returned it to our bankers, to have the needful done." In a suspension, the Lord Ordinary "sustained the reasons of suspension; but on a reclaiming petition and answers, the Court were clear that the *noting* was sufficient ne-

When the days of grace are expired, before diligence can be used against the accepter, as where a bill is indorsed after the period of payment, though the holder does not protest it, he preserves, as before noticed,[t] his right of recourse, if he presents the bill for payment, and gives intimation within a reasonable time to the other parties, of payment being refused.

Effect of accidental delay.

Promissory-notes may be protested by the payee against the granter, and inland bills, payable to the drawer, may be protested at his instance against the accepter, at any time within six months after they are due, so as that summary diligence may proceed upon them, against

Protest of promissory-notes and inland bills.

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gotiation, and that the letter, signifying only that the bill had not yet been protested, left fully to be understood the fact that it had been *noted*, which is a common practice, the protest being afterwards drawn out in regular form. The Court therefore altered the Lord Ordinary's interlocutor, and sustained the recourse against the suspender."

Where it appears, however, in an action of recourse, that no protest has ever been extended, the English Courts have nonsuited the holder of the bill. Rogers *v.* Stephens, 2 Term Rep. 713. Gale *v.* Walsh, 5 T. R. 239. See also Barbour *v.* Newall, 23d May 1823, Shaw's Rep. II. 328. In this case, a protest taken in 1811, including several bills, and irregular in other respects, was produced. The inferior Court, and the Lord Ordinary, held that the bills had not been duly protested, and assoilzied. The charger then produced separate instruments, made up from the original protest. The Court held, that though an instrument of protest might be extended at any distance of time, provided it was done from authentic evidence, yet there was here no such evidence, and sustained the defences.

In all cases, the protest ought to be made out and registered within six months, for the sake of summary diligence. (See ch. x.) As to the point, whether the protest, or a copy, must accompany the notice of dishonour of the bill, see p. 234.

[t] See *sup.* p. 191.

these parties; but where there are other parties, recourse upon them will be lost, unless the notes or bills be regularly and duly protested in the manner above prescribed.

Transference of protested bill.

A protested bill, after registration, cannot be transferred by indorsement, but by assignation, like other rights; for no decrees are transmissible by indorsation; and registration is, in the judgment of the law, a decree.[u] By the assignment, the whole privileges competent to the cedent or assigner, are vested in the assignee, who is not subjected to any exceptions that might be pleaded by the accepter against the original creditor in the bill.[v]

Notary and witnesses.

In protests of bills, it is not necessary, either that the witnesses whose names are inserted in the instrument should be designed therein, or that they should subscribe as witnesses. Without these formalities, the protest, with the bill, is sufficiently probative, both against the drawer and drawee.[w] A bill, drawn on a house in London, was found duly protested, though the notary was not present. His clerk presented the bill for payment, and returned with the answer to his master, who extended the protest at home,

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[u] Ersk. b. iii. t. 2. § 31. This doctrine of Erskine has not been confirmed by subsequent practice. See *sup.* p. 133.

[v] *Ibid.* The case of Douglas *v.* Elliot, Mor. 1515, seems to be a decision to this effect. See *sup.* p. 147 & 148, note [k].

[w] Stair, b. i. t. xi. § 7. All foreign courts give credit to a protest, made out according to the forms of the conntry in which it is taken. Chitty, 216.

and inserted the names of two witnesses, as if they were present; this being according to the form and practice of London.[x] A bill may be protested for non-acceptance, notwithstanding an offer has been made of a partial, qualified, or conditional acceptance, if the holder does not accede to that offer;[y] and, if he do not instantly agree to receive it, the drawee may retract. But if the holder acquiesces in an acceptance for part of the sum, which possibly may be to the extent of the drawer's effects in the hands of the drawee, he ought to protest for non-acceptance, as to the residue; and, on receiving the partial payment, when the bill falls due, protest for non-payment of that balance.[z] All bills that have been protested for non-acceptance, ought also to be pro-

Protest on partial or conditional acceptance.

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[x] 1764, Stevenson *a*, Stewart and Lean, Fac. Coll. v. iii. p. 90. Mor. 1518. The same practice prevails to a considerable extent in Scotland, but as yet it has been supported by no decision. Mr Bell, on the contrary, observes, that "the notary himself must, according to our practice, make the presentment, or be present," Comm. I. 325; and notwithstanding the frequency of this custom in England, it does not appear to have been expressly sanctioned in any case.—Chitty, 217, quoting Mr J. Buller's opinion, states, that "the demand is the material thing, and must, it is said, in the case of a foreign bill, be made by a notary-public himself, to whom credit is given because he is a public officer, and it cannot be made by his clerk." The practice, however, seems to have been tacitly approved of, from its never having been objected to. In Elford *v.* Teed, 1 Maule & Selw. 28, presentment by the notary's clerk appears to have been looked on as sufficient. In Leftly *v.* Mills, 4 T. R. 170, in which a similar presentment was made, Buller, J., intimated a doubt whether it was regular. These cases were decided on a different ground.

[y] Stair, *ut supra.*

[z] Molloy, b. ii. c. x. § 21. See *sup.* p. 115, note [f].

tested for non-payment, when they become due.[a]

When drawee unknown.

When a bill is drawn on a person who is either unknown or cannot be found, it may be protested at the market-cross of the town in which he was described to reside; and the protest should express, that strict search had been made for him.[b] A bill being drawn, which bore to be payable at no certain place, and protested at the head burgh of the shire where the accepter had his residence, the protest was found good.[c] If the holder be at a loss to know which of two persons of the same name a bill is drawn upon, and both refuse acceptance, he ought to protest it against both.[d]

Payment *supra* protest.

When he on whom a bill is drawn, upon the account of some particular person, for whom he does not wish to pay it, has funds of the drawer in his hands, he ought to allow it to be protested against himself, and then pay *supra* protest for the honour of the drawer or indorser.[e] The reason of which seems to be,

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[a] Poth. n. 133. Sav. tom. ii. ch. 14. max. 1. Boucher, n. 1502. But see *sup.* note [m], p. 192.

[b] Mar. p. 133. Scarlett, c. xi. r. 13. Forbes, p. 120.

[c] 1745, Creditors of Glendinning *a.* Montgomery, Kilker. (Arrestment) No 16. p. 41. Mor. 1449. The statement in the text is erroneous. The Court had no doubt, that the protest so taken was null; and the point argued in the report is, whether the holder had the power of retaining, till his debt was paid, some sheep which he had poinded, *bona fide,* under the erroneous protest. A protest can be taken at the head-burgh of a shire, only when the accepter's residence cannot be discovered.

[d] Scarlett, c. xi. r. 14.

[e] Sav. tom. ii. ch. ix. § 12. Scarlett, ch. xxxvi. r. 19. Mar. 125. Beawes, n. 121. See *sup.* p. 183.

that the drawer or indorser may thereby be informed of the drawee's sentiments with regard to the person, for or upon the account of whom, the bill is drawn, and that he paid merely for the honour of the drawer or indorser.

When bill lost.

Where the original bill is lost, and another cannot be had of the drawer, a protest may be made from a copy, especially when the refusal of payment is not for want of the original, but for some other cause.[f] If no copy has been kept, a protest must, at any rate, be taken, in which must be expressed the cause of the bill not being prefixed.[g]

Protest for better security.

Besides the protest for non-acceptance and non-payment, there is, in England, and some other countries, a protest for better security, which is usual when a merchant, who has accepted a bill, becomes insolvent, or is publicly reported to have failed; or when the holder has good reason to believe it will not be paid; in such cases, he may demand better security; and, on that being refused, cause a protest to be taken to that purpose; which protest must, as in other cases, be notified by next post, whereby the drawer will be obliged to furnish further security, or make

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[f] Kyd, p. 139. Dehers *v.* Harriot, 1 Shower, 164. Here a first bill of exchange on Dublin was sent, and lost. A second was not sent, but a copy only, and a protest taken on it was held good.

[g] Poth. n. 145. Boucher, n. 1482. A bill being lost, a decree for payment was given on the simple representation of the protest, and the bill declared null, n. 1483.—A.

immediate payment,[h] being bound to the holder in the same manner as if a protest had been taken for non-acceptance. In Scotland there is no instance of the protest for better security.

Holder's remedy on protest for non-acceptance.

When a bill is protested for non-acceptance, the holder may instantly charge the drawer and indorsers for payment, contrary to the custom of most other places, where no demand is competent against these parties, till the bill becomes due.[i] But after a bill has been accepted, summary diligence can only proceed in the case of non-payment. The holder must therefore wait the term of payment, and protest for non-payment and recourse, before he can make any demand upon the drawer and indorsers. If, however, the debtor in a bill be notoriously *vergens ad inopiam*, the holder has the ordinary remedy of an arrestment in security, which may be issued at his instance, and application, by any judge having a competent jurisdiction, upon production of the docu-

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h Molloy, b. 2. c. 10. § 32. Mar. 116. A protest for better security does not make it incumbent on the drawer or indorsers to furnish better security. The chief use of it is, that by the notice which they thus receive of the probability of the bill not being paid, they may be enabled to save the expense attending a return of the bill dishonoured, by providing for its payment otherwise. The neglect of this protest and notice does not injure the holder's recourse, and though the drawer do not furnish additional security, the holder must wait till the day of payment. Chitty, 240.

i In England, if acceptance be refused, and the bill returned, an action may be immediately commenced against the drawer, though the regular time of payment, according to the tenor of the bill, be not arrived. Kyd, p. 111. An action lies by the indorsee against the indorser, upon a bill of exchange, immediately on the non-acceptance of the drawee, though the time for which the bill was drawn be not elapsed. Manning, p. 75.—A.

ment of debt; and by this means he may attach the property and effects of the debtor in the hands of any third party, till sufficient caution be found for payment of the sum for which the arrestment has been laid.[k]

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[k] The heritable property of the debtors in a bill not due, may, in like manner, be affected by inhibition and adjudication in security. See ch. x.

# CHAP. VIII.

## OF THE NEGOTIATION OF BILLS.

THE doctrine of negotiation is unquestionably the most important in the whole law of bills of exchange, and has given rise to the greatest number of disputes. Though the subject, therefore, has been necessarily anticipated, in many points, in the four immediately preceding chapters, it requires, for a fuller discussion, to be treated of under a separate head.

Nature of negotiation.

The negotiation of a bill consists, either in acts that are voluntary on the part of the holder, such as indorsing it away, and uplifting the value, or in those that are necessary. In the latter sense, negotiation implies a right in the drawer or indorsers to require that the bill be duly presented for acceptance or payment; that if payment or acceptance be refused, it be duly protested; and that notification of the dishonour shall be duly made to the parties concerned, on whom recourse may afterwards be claimed. By this right, consequently, a correlative duty is imposed on the holder, to present and protest the bill, and to give

the requisite notification to the drawer or indorsers.

Neglect of due negotiation forfeits recourse.

That the holder of a bill who has been guilty of any neglect, and has not used exact diligence, should lose his recourse against the drawer, if the drawee should afterwards become insolvent, is a rule founded on the most equitable principle. For, as the drawer transfers, by the draft, the whole right he had to demand payment himself from the drawee, to the person to whom it is made payable;—if *he* allow the drawee to fail, when he might, by due negotiation, have recovered payment, it is but reasonable that he should suffer for his negligence, and not the drawer, whose hands were bound up by the draft.[a] But even when the drawee continues solvent, the law is the same; for, in that case, the holder can suffer nothing by losing his recourse against the drawer, as he may recover the sum from the proper debtor; and, therefore, is not to be indulged in an unnecessary action of relief against the drawer, which he is held to

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[a] Ersk. b. 3. t. 2. § 34—1729, Flower *a.* Pringle, Dict. v. i. p. 101. Mor. 1560.—1737, Adam *a.* Dick, Home, No 54. p. 95. Mor. 1563.—1758, Tod *a.* Maxwell, Dict. v. 3. p. 84. Mor. 1583. The same observation applies, of course, to the claim of a holder against the indorsers.

It is held, that neglect of negotiation is not imputable to the Crown; and therefore, if a bill not due is seized in virtue of an extent, and the officer neglects to give notice of dishonour to the drawer and indorsers, they will not be discharged. West on Extents, 28-9.

have renounced, by neglecting the due negotiation of the bill.

Time for notice of dishonour.

It has been shown, in what has been said about the acceptance[c] and payment[d] of bills, that the holder is taken bound, in the event of non-acceptance or non-payment, to notify the same to the drawer and indorsers. It would be difficult to fix any particular period within which this notification should be made, as it must depend so much on the local situation of the parties, and other circumstances. In France,[e] intimation of the dishonour of bills must be given within fourteen days, to parties who reside in the kingdom, within ten leagues of the place; and, beyond that distance, a day longer is allowed for every five leagues. To parties residing in England, Holland, or the Netherlands, notification must be made within two months; in Italy, Germany, and Switzerland, within three months; in Spain, within four months; and in Portugal, Sweden, and Denmark, within six months. In terms of this regulation, where there are several indorsers to the bill, who perhaps reside in different kingdoms, the holder must intimate to the last indorser, within the limited time, according to the

In France.

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[b] Ersk. *ibid.*—1746, Littlejohn *a.* Allan, Falconer, v. 1. No 147, p. 185. Mor. 1569.

[c] Ch. IV. p. 105.

[d] Ch. VI. p. 160.—Ch. VII. p. 188.

[e] Ordon. de Com. t. 5. art. 13.

distance; he to the next indorser;—and he, again, to the drawer in the same manner.

In England,[g] and in this country,[h] the rule In Great Britain.

[f] Sav. tom. 1. liv. 3. ch. 6.—Poth. n. 153.

[g] 9. and 10. William III.—3. & 4. Anne.

[h] 12. Geo. III. c. 72. § 41. made perpetual by 23 Geo. III. c. 18. § 55.

This statement is not strictly correct, so far as regards the law of England. Previous to the acts cited in note [g], it was not competent to protest an English inland bill at all for non-acceptance or non-payment; and recourse against the drawer and indorsers was preserved by *reasonable notice* alone. But as, without a protest, the holder of a bill could not in any case recover from the drawer and indorsers, costs, damages, and interest, these acts authorised a protest upon the non-acceptance and non-payment of certain descriptions of inland bills, and declared, that if notice of the *protest* was given within fourteen days after its date, the holder should be entitled to recover his costs, damages, and interest. See sup. p 188, note [a]. These provisions, however, do not relate to the holder's right to recover the principal sum; and it is still necessary, in order to found a claim for it, that reasonable notice of non-acceptance or non-payment be given to the drawer and indorsers. The law of England regarding recourse for the principal sum, is the same as to the notice of dishonour both of inland and of foreign bills. Chitty, 218-19, 311-12.

In Scotland, the notice of non-payment or non-acceptance stands on quite a different footing. With us, no doubt ever existed as to the necessity of a protest of inland bills, and the holder's right to recover interest and costs on them at common law, equally as on foreign bills. But when the statute 12 Geo. III. c. 72, regulating inland bills, was passed, the difference between the laws of England and Scotland on this point was not attended to, and the English rule, of notice within fourteen days, was unwarily adopted, without any qualification. The recourse for the whole contents of the bill is, by that act, made to depend on notice within the fourteen days; and as its terms are quite explicit, this construction has been sanctioned by the Court. Baird *v.* Belsh, 3d July 1803, quoted in Bell's Comm. I. 329, in which a delay of 12 days was held not to injure a holder's right of recourse against an indorser.

The following are the provisions of the act 12. Geo. III. ch. 72, on this subject:—It is enacted, that "all inland bills and promissory-notes shall be protested in like manner as foreign bills, before the expiration of the three days of grace, otherwise

with regard to inland bills is, that notice must be given within fourteen days after the protest is taken; and as to foreign bills, the established practice and law in both countries is, that notice shall be given without any undue delay. What may be accounted an undue delay, must be, in a considerable degree, *in arbitrio judicis*, and determined from the circumstances of the case. But, in general, it may be laid down, that if the delay has been occasioned by the neglect or omission of the holder, or, what comes to the same thing, if it might have been prevented by the exertion of ordinary activity and despatch, recourse will be lost. Thus, if one post be lost in protesting the bill, and notifying the dishonour,[i] or, if notification is not given till the fifth day after the protest, when it might have been sent immediately, or at least within a shorter time, the holder forfeits his right of relief.[k] But

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there shall be no recourse against the drawers or indorsers of such inland bills, or against the indorsers of such promissory-notes; and it shall be sufficient to preserve the said recourse, if notice is given of the dishonour within fourteen days after the protest is taken; without prejudice to the notification of foreign bills, to be made within such time as is required by the usage and custom of merchants."

[i] 1743, Ramsay *a.* Hog, Dict. v. 3. p. 83. Mor. 1564. In this case the bill was not *protested* till the day after the last day of grace.

[k] 1774, Reynolds *a.* Syme, &c. Fac. Coll. No 105. p. 280. Mor. 1598.

As the English decisions, which may be regarded as direct authorities in our Courts, in questions of this kind, have ascertained the rules regarding notice of dishonour much more minutely than has yet been determined in Scotland, it is proper to present a summary of the points fixed by them. Though the following observations must be understood to apply almost en-

if the delay has been caused by any unforeseen accident, or fortuitous occurrence, the *porteur*

When notice delayed by accident.

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tirely to the notice of dishonour of Scots *foreign* bills, the decisions quoted regarding English *inland* bills are authorities on that point. See note [h].

There are two modes of giving notice of the dishonour of a foreign bill, by either of which recourse may be preserved to the holder and each indorser, against the whole parties liable to them. 1. By the holder duly intimating the dishonour to the drawer and all the indorsers; or, 2. By his duly intimating it to his own indorser, by whom due notice is given to the preceding indorser, and so on, from party to party, till the notice reaches the drawer. In both of these cases, the right of every party to claim against the whole prior parties is preserved entire, Bayley, 208-9. Jameson and others *v.* Swinton, 2 Camp. 447. Bill due on Saturday, 8th July, and dishonoured. Notice was given by holders to plaintiffs, the next indorsers, on Monday, by them to Elsom, the next indorser, the same evening, and by him to defendant on the following day. Per Lawrence, J.—"I am of opinion, that the drawer or indorser is liable to all subsequent indorsers, if he had due notice of the dishonour of the bill from any person who is a party to it. Such a notice must serve all the purposes for which the giving of notice is required. The drawer or indorser is authoritatively informed, that the bill is dishonoured; he is enabled to take it up if he pleases; and he may proceed immediately against the accepter or prior indorsers."—Verdict accordingly. The notice, however, must come from the holder, or some person entitled to call for payment or reimbursement under the bill, or from the agent of such persons. It is not enough that the dishonour have been merely heard of from a stranger, Bayley, 206. Bell's Comm. I. 330. See *post.* p. 228, note [p].

The whole parties being liable, conjunctly and severally, to the holder, he is not bound to give notice to his immediately preceding indorser; he may select any obligant he chooses upon whom to operate his recourse; but the indorsers between himself and the indorser latest in date, to whom he gives notice, will in these circumstances be discharged. Bell's Comm. *ib.* And if the holder intimate only to some of the parties, who give no notice to those preceding them, these last will be freed, and the loss will fall on the indorser first on the bill, who received the notice. Elliot *v.* Bell, 14th Feb. 1781, Mor. 1606, *post.* p. 215. It is thus the interest of the holder, and of each person to whom the dishonour of a bill is communicated, to intimate immediately to the whole

will not be deprived of the usual remedy, if he has notified as soon as it was in his power to do

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parties, against whom they are entitled to claim recourse, in order to avoid the risk of a neglect by the rest.

The following are the rules as to the *time* within which notice must be given:—

1. It is not too soon, if despatched, after refusal, on the day of payment, because, though payment may still be made on that day, the bill is dishonoured from the moment of such refusal. Burridge *v.* Manners, 3 Camp. 193.

2. To persons living in the same place, notice must be communicated by the holder, at the latest, before the end of the day following the day of refusal, and by other parties, before the end of the day following that on which they themselves receive notice of the dishonour. Tindal *v.* Brown, 1 T. R. 167. 186. Bill due on 5th Oct.; but notice not given till 7th, though all the parties lived in Bristol. The Court held that recourse was lost.—Smith *v.* Mullet, 3 Camp. 208, in which plaintiff received notice on a Monday, and put an intimation to the next indorser into the twopenny post on the Tuesday; but so late, that it was not delivered till Wednesday morning. It was held, by Lord Ellenborough, that the defendant was discharged, a day having been lost.—Hilton *v.* Shepherd, 6 East, 14, where the holder gave notice on the day of refusal of payment to the fifth indorser; he, on the next day, to the fourth; he, on the next day, to the third; he, on the next day, to the second; and he, on the same day, to the first; it was held the negotiation was sufficient. See case of Batchin & Birkmyre *v.* Orrs, *post.* p. 217-9.

3. To persons living in another place, notice ought to be despatched by the next post; but it appears it is sufficient, if despatched by the holder, not later than by the post of the day following the day of refusal of payment, and by the indorsers, not later than the post of the day following that on which they receive notice. Darbishire and another *v.* Parker, 6 East, 3, in which case, notice from the plaintiffs, in Manchester, to the drawer, in Liverpool, was not sent by the post of the day on which they received it, or of the next, but by a private person, who did not deliver it till two hours after the arrival of the latter post. It was held, that at all events the post of the next day was the latest period for giving notice, and that, therefore, the intimation was not in time. Bray *v.* Hadwen, 5 Maule, 68, where notice of dishonour was received on a Sunday by indorsers, who put an intimation to a prior indorser into the post-office on Monday evening, which went by the post at twelve on Tuesday.—A

so. For instance, if the failure to intimate arose from the holder's being ignorant of the indorser's place of residence, recourse will still be competent, if it be shown that immediate inquiry was made after him, and notification given as soon as his place of residence was discovered.

Case of Hodgson and Donaldson *v.* Bushby.

Bushby of Ardwell, in Scotland, when in London, put his name as indorser to a bill, accepted by Graham, and delivered to Hodgson and Donaldson, payable in London two months after date. This bill, when it became due, was regularly

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post had gone at twelve on Monday. The Court held it was now the settled rule, that each party was entitled to an entire day for the purpose of giving notice, and that the indorsers were, therefore, not bound to send their notice by the Monday's post, but had the whole of Monday to put in their letter. In Williams *v.* Smith, 2 Barnewell & Alderston, 496, Abbot, C. J. said,—"It is of the greatest importance to commerce, that some plain and precise rule should be laid down to guide persons, in all cases, as to the time within which notices of the dishonour of bills must be given. That time I have always understood to be, the departure of the post on the day following that on which the party receives the intelligence of the dishonour."

4. It is no excuse for undue delay in giving notice, that if all the time which law allows for passing the notice from party to party, had been taken up, it would not have reached a party pleading the want of it, sooner than it has actually done. Whether notice has been duly given is, in all cases, to be judged of by the time each party has himself received it. Bayley, 223-4.

5. A party is excused from sending notice on a day of public rest, or a day on which his religion forbids his attention to business. Lindo *v.* Unsworth, 2 Camp. 602. It is therfere held, that if a party receive notice on a Sunday, it is the same as if he did not receive it till the Monday; and he is not bound to send notice to the preceding parties till the Tuesday's post. Bayley, 220. Wright *v.* Shawcross, 2 B. & A. 501. Bray *v.* Hadwen, *sup.*

The opinion of Erskine, B. 3. t. 2. § 33, that intimation of dishonour is in time if made within three posts, is not now adhered to. Bell's Comm. I. 328.

protested against the accepter for non-payment; but the indorser having left London, and the holders being unacquainted with his place of residence in Scotland, no intimation of the dishonour was sent to him for twenty-one days thereafter. In a process, at the suit of the holders, for recourse against the indorser, who objected the want of due negotiation, the Lord Ordinary repelled the defence, in respect it was admitted that the defender left London, the then place of his residence, before the bill became due, and left no notice where he might be found or wrote to. And this judgment, though altered by the Court, was affirmed by the House of Lords upon an appeal.

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[1] 1782, Hodgson & Donaldson *a* Bushby, Fac. Coll. No 56, p. 88.—12th May 1783, Journals of the House of Lords.

The holder, however, must use due diligence to find out the address of the parties, to whom he intends to give notice.—Beveridge *v.* Burges, 3 Camp. 262. Excuse for want of notice to an indorser, that holder did not know his residence; but the only inquiry he proved was at the house where the bill was payable. Per Lord Ellenborough,—How could he expect information there? He might have inquired of other parties to the bill, or of persons of the same name in the Directory. Ignorance may excuse want of notice, but reasonable diligence must be used to obtain knowledge. Bateman *v.* Joseph, 2 Camp. 461. Here plaintiff, not knowing the address of defendant, went to the counting-house of his immediate preceding indorser,—but he being from home, he could get no information. A few days afterwards, receiving the information on the return of that indorser, he then gave notice. Per Lord Ellenborough,—" When the holder of a bill of exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy, by not communicating immediate notice of dishonour of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance, but if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as

Case of Carrick v. Harper.

Ker granted a promissory-note for L.217, 11s, to Harper, or order, payable in London three months after date. This note Harper indorsed to Carrick of Glasgow, who indorsed it to Walker, one of the agents or riders of Johnston in Manchester. By Walker it was indorsed to Johnston his employer, from whom it came, by another indorsation, into the hands of Jones and Co., of London. On the last day of grace it was protested for non-payment by Jones and Co., and, within three days after, the dishonour was intimated to Johnston at Manchester. Walker, Johnston's rider, being at this time from home, Johnston, owing to his ignorance of the address of Carrick, the preceding indorser, did not give any intimation till the fourteenth day after the date of the protest; and the latter immediately gave notice to Harper, to whom the note had been originally granted. The contents of the note having been paid by Johnston to Jones and Co., and by Carrick to Johnston, a question arose, whether Harper was obliged to relieve Carrick of the loss; which was tried in the suspension of a charge given to Harper. The Lords "found the letters orderly proceeded;" thereby sustaining Carrick's claim against Harper for the amount of the note. The judgment

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soon as this is discovered, is due notice of the dishonour of the bill, within the usage and custom of merchants." He was rather inclined to think there had been laches, but the jury found for the plaintiff; and on rule to set aside the verdict, Court all of opinion the question had been properly left to the jury, and refused the rule.

of the Court proceeded on this ground, that, in a question between two indorsers, it was sufficient, for authorising a claim of recourse, that, in intimating the dishonour, no improper negligence could be alleged.[m]

In conformity with the principle of these decisions, it was found, that a delay of twenty-one days in the notification of the dishonour of a promissory-note, created by the miscarriage of a letter containing the notification, did not bar the holder's right of recourse.[n]

Bills between Scotland and England are *foreign* bills.

It may be here proper to observe, that bills drawn in Scotland, and payable in England, are accounted foreign bills; and the same strictness

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[m] 1790, Carrick *a.* Harper, Fac. Coll. No 132, p. 259. Mor. 1614.

[n] 1799, Henderson *a.* Duthie, *ibid.* No 104, p. 241. Mor. App. to Bill of Exchange, No 7. The observation at the end of the report of this case, that neglect of intimation does not entirely take away the right of recourse, but only founds a claim for damages, is erroneous, it not being necessary for the drawer and indorsers to prove any damage.—See p. 203, *sup.*

On the same principle with that recognised in the cases above quoted, want of notice will be excused when it has been impossible to communicate it on account of inevitable accident, —such as the death or sudden illness of the holder or his agent, and the like, and provided notice be given as soon as the obstacle is removed.—Chitty, 212. No excuse, however, which does not amount to an absolute impediment, will be regarded. In Turner *v.* Leach, MS. Chitty, *ib.*, the excuse for want of notice from an indorser was, that on account of the dangerous illness of his wife at a distant place, he had, on 1st September, left his house in care of a lad, without authority to open letters, intending to return on 3d September; but that on account of the increasing dangerous illness of his wife, he did not return till after 8th September, on which day his brother opened the letter, and immediately gave notice. Lord Ellenborough ruled, that these circumstances afforded no excuse for want of notice.—See also Batchin and Birkmyre *v.* Orrs, post. p. 217.

of negotiation is required with regard to them as in other foreign bills.[o]

Notice in the case of inland bills.

Timely notification of dishonour ought to be made to every indorser, whether prior or posterior, upon whom recourse is to be claimed.[p] In inland bills, this notification should be made to the last indorser, within the legal period of fourteen days, and to a prior indorser within the same period,[q] or, at least, without any undue

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[o] 1803, Fergusson & Co. *a.* Belsh. *ibid.* No 111, p. 244, Mor. *ib.* No 13. Reynolds *v.* Sym, &c., Mor. 1598. A bill taken, payable in England, for the price of goods furnished in Scotland, renders the debt English. 1792, Watson *a.* Renton, Fac. Coll. No 197, p. 409. Mor. 4582. And where a bill is drawn in a foreign state on a person in Scotland, it creates, though not accepted, a debt which is held to be Scotch.

Campbell, a Scotsman, who was settled as a merchant at New York, became indebted to Armour in the course of trade. Towards payment of a part of the debt, Campbell drew a bill on his father at Greenock, payable to Armour, which, however, was not accepted.

Soon afterwards Campbell became bankrupt, and, by the law of that State, obtained a statutory discharge similar to that resulting from the certificate of conformity in England.

On his returning to Scotland, personal diligence was raised against him upon the bill, which he brought under suspension on the ground of the claim being extinguished by the act of the *lex loci* above mentioned. The Court found, that in the circumstances of the case, the statutory discharge obtained in the State of New York, cannot bar the charger from recovering payment of the sums due to him in this country, by the ordinary diligence of the law of Scotland.—1792, Campbell *a.* Armour, Fac. Coll. No 198, p. 417.—A.

[p] See *sup.* p. 206, note [k].

[q] By § 41. of 12 Geo. III. c. 72, it is provided, in general terms, that notice of the dishonour of inland bills and notes shall be given to the drawers and indorsers of the bills, and indorsers of the notes, within 14 days after the protest, from which it may be inferred, that the notification must be given within that period to all indorsers, prior as well as posterior, if recourse is meant to be claimed against the former.—A. See next note.

delay; as means are thereby afforded the latter of operating his relief, which delay may often frustrate; and without such intimation, a prior indorser is naturally put off his guard against an unforeseen claim, that might perhaps be allowed to lie dormant for years before an action was raised on it,—which aggravates the hardship of being capriciously subjected to such a demand. Besides, if intimation was only necessary to be made to the last indorser, within the fourteen days, it would be in the power of the person in whose hands the bill was first dishonoured, by withholding the intimation till the fourteenth day, to throw the loss on any of the indorsers he chose to single out.[r] It has accordingly been

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[r] The question alluded to in the text,—whether, when the holder of an inland bill intimates the dishonour to an indorser at so late a period of the fourteen days, that the latter has not time to give notice within that period to the parties prior to him, recourse upon these parties is lost, or whether reasonable notice by the indorser to them will suffice,—is attended with considerable difficulty. It may be said, on the one hand, that the holder having the power to select which of the obligants he chooses, a notice to an indorser within the time allowed by the statute, must render that indorser liable; and if he who has not been the cause of the delay, give reasonable notice to the prior parties (which is all that is now in his power), he ought justly to be allowed recourse against them. On the other hand, it may be maintained, that as the statute requires notice to be given within fourteen days after the protest is taken, and as the holder has by his own negligence prevented this from being done, (the time being more than sufficient for the purpose,) no claim can lie against the prior parties; and as a consequence of this, that the holder cannot recover even from the indorser to whom he gave notice, because he has by his own fault cut off that party's recourse. This point is not settled by any decision. Mr Bell, Comm. I. 331, inclines to the latter of these views.

decided, that notification to the last indorser, is not sufficient, *per se*, to preserve recourse against the prior indorsers.

Case of Elliot *v.* Bell.

W. Bell granted to J. Bell his promissory-note for L.560, which the latter indorsed to Grant, by whom it was indorsed to Elliot. Elliot not having recovered from W. Bell, the granter, intimated the dishonour to Grant, the last indorser, but made no intimation to J. Bell, the prior indorser, against whom, however, he raised an action of recourse. On considering the debate, the Lords found, as above, that notification to the last indorser is not sufficient, *per se*, to preserve recourse against the prior indorsers, and remitted to the Lord Ordinary to hear parties further on the particular circumstances of the notification to Bell, or other specialities alleged for Elliot the pursuer. A proof of the circumstances relative to the notification was allowed by the Lord Ordinary; upon advising which, his Lordship found that the pursuer had failed to prove such notification of the dishonour of the bill in question, or such other specialties, as could subject the defender in an action of recourse,—to which interlocutor the Court adhered.[s]

To what parties notice to be given.

When the claim of recourse is made on the first indorser, he cannot object that the holder ought to have notified the dishonour to the pos-

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1781, Elliot *a.* Bell. Fac. Coll. No 36, p. 65. Mor. 1606. See *sup.* p. 206, note [k].

terior indorsers; seeing that, if he satisfies the claim, no further demand can possibly come against them. To preserve recourse against him, therefore, it is not necessary to notify the dishonour to these indorsers.[t] Should the holder, in this case, fail to recover from the first indorser, he ought in strictness to resort to the indorser who is next ultimately liable, by which means the rights and remedies of the posterior indorsers would be less affected. But it would appear, from the English decisions, that as all the parties on the bill are equally liable to the holder, he is entitled, in the event of not obtaining payment from the drawer, to recur to the last indorser, and to demand payment from him.[u] It is questionable, whether this inversion of the usual order would be admitted in this country, unless due notification had been given to the whole indorsers. No doubt, all the parties on the bill are liable for the contents to the holder; and he has a right to insist for payment against any one of them. But these parties have also a right to insist on the bill being negotiated according to the ordinary and established rules. If the holder, therefore, chooses to claim his recourse directly from the drawer, and to pass by

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[t] 1799, Henderson *a.* Duthie. No 104, p. 241, Fac. Coll. Mor. App. to Bill of Exchange, No 7.

[u] Kyd, p. 112. It was at one time held in England, that notice of dishonour must have been given to the drawer, and payment demanded from him, before a claim could be made against the indorsers. This opinion has, however, long been departed from. Chitty, 229.

all the other indorsers, without informing them of the dishonour, it is doubtful how far they ought to be responsible, in case payment has not been obtained from the drawer. Some of the intermediate indorsers may have become bankrupt in the mean time; and if a last indorser were obliged to retire the bill, after a considerable lapse of time spent in seeking payment from the drawer, he might be deprived of his remedy against the very person to whom he gave value for the bill, and upon whose credit he was induced to receive it; which would, in effect, be defeating the very end and purpose of strict negotiation, which is established merely to obviate and prevent the occurrence of such losses.[v]

Notice between indorsers.

Though the period for notification between indorsers themselves is not yet fixed by any precise rule, it is sufficiently ascertained, that it behoves to be as speedy as possible, and such as is not protracted by any undue delay, which will appear from the following case:—

Case of Batchin and Birkmyre v. Orrs.

Wright and Beavis of Bristol granted a promissory-note to Batchin and Birkmyre of Paisley, for L. 167, payable at the house of Sir James

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[v] There is no question, but that in the case supposed in the text, of notice having been given only to the drawer, and on his failure, a demand made against the indorsers, to whom regular notice had not been given, that they would not be liable. Every obligant is discharged, to whom notice of dishonour is not duly given; but when once duly given, the holder may make a demand against any one of them, and at whatever time he pleases. The English law is not different from the Scots in this respect, for without due notice the indorsers would, in the case supposed, be discharged. *Sup.* p. 206, note [k].

Sanderson and Co. London. Batchin and Birkmyre indorsed this note to Messrs Orrs of Paisley, who again indorsed it to Cleuch of Manchester. From him it passed, by indorsation, through many hands, till it was presented by Ralph of Moorfields, at Sir James Sanderson's house, and protested for non-payment on the 11th of June. Batchin and Birkmyre received no notice of the dishonour till the 30th of June, when they were informed by a clerk of Messrs Orrs, that it had returned dishonoured, and that they would be called upon for payment. Batchin and Birkmyre asked for the bill immediately, but it was not delivered to them till next day, when, being ignorant at that time of there being any undue delay on the part of Messrs Orrs, they paid to the latter its contents, and, sending the note off for Bristol, received for answer, that Wright and Beavis had stopped payment. Batchin and Birkmyre, on inquiry, having ascertained that the note had been returned to Messrs Orrs on the 27th June, and that there had been a delay of between three and four days, till the 30th, in intimating to them the dishonour, brought, on that score, an action of repayment against Messrs Orrs for the value of this note. The defenders admitted (what is the received doctrine), that the notification of dishonour betwixt indorser and indorser ought to be within a space of time as short as possible, and not protracted by any undue delay; and they urged, in excuse for their delay, that Mr Orr being at his

country-house, twenty miles from town, his clerk, on receiving the letter which contained the bill on the 27th, sent it on the 28th, unopened, to his master in the country, who the next day returned it by post to Paisley, whence it became impossible to present it till the day following, viz. 30th June. It was argued, on the other hand, that this delay was unwarrantable; the dishonour ought to have been intimated on the 27th; and if a merchant chooses to leave his banking-house and go to the country, he ought to commit his business to a responsible person, empowered to open his letters, and transmit such as require despatch. On the part of Messrs Orrs, it was attempted to be shewn, that no injury had in fact arisen from the delay, as the bill, though it had been notified on the 27th as dishonoured, could not have arrived at Bristol before Wright and Beavis had committed an act of bankruptcy. The Court thought it unnecessary to investigate that circumstance. It was enough, that an undue delay of three days was clearly ascertained; and, on that medium, they decerned for repetition against Messrs Orrs.[w]

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[w] 1792, Batchin and Birkmyre *a.* Orrs. Dict. v. iii. p. 87. Mor. 1619. In Andrew *v.* Adam, 2d June 1812, Fac. Coll., it is said to have been decided, "that in a question among indorsers, notification of dishonour seventeen days after the bill was protested, was found sufficient and due negotiation, though the parties lived in the neighbourhood of each other." From the statements of the parties, however, it appears that the holder

Party objecting to negotiation need not prove damage.

Where the holder has failed in proper negotiation in general, the drawer is not obliged to show that damage was sustained, or that the accepter had become insolvent in the interim.[x] The holder is in all cases bound to strict diligence, and the least failure throws the hazard upon him. It is sufficient, in a defence against recourse, for the drawer to say he might *possibly* have recovered from the accepter.[y] But though regular notification be rigidly required where the drawer has funds in the hands of the drawee, because the former cannot otherwise take the steps which may be requisite for securing his property, yet if it be shown or admitted, that the drawee had no effects, strict negotiation on the part of the holder is dispensed with, in so far as the drawer is concerned, in as much as he can sustain no loss on that account.[z] The necessity

Notice of accommodation-bill.

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did not know where the indorser resided, and that she gave intimation to him as soon as she received that information. The case of Batchin *v.* Orr seems to have decided, that as little indulgence in giving notice of dishonour is allowed in questions among indorsers, as where the drawer is concerned, a rule which is supported by the English authorities. The situation of the parties makes the same strictness necessary in both cases, each indorser, on the dishonour of the bill, being as much interested in taking measures to secure his recourse, as the drawer is in removing his funds from the accepter's hands. See *sup.* p. 206, note [k]. As to the intimation of dishonour of inland bills between indorsers, see p. 203-4.

[x] 1737, Adam *a.* Dick, C. Home, No 54, p. 95. Mor. 1563. Chitty, 198.

[y] 1729, Flower *a.* Pringle, Dict. v. 1. p. 101. Mor. 1560.

[z] 1731, Mackenzie *a.* Urquhart, Dict. v. 1. p. 100. Mor. 1561.—1805, Hill *a.* Menzies & Anderson's trustees, Fac. Coll. No 211, p. 471. Mor. App. to Bill of Exchange, No 18. Poth. n. 156.

If a merchant in Paris, says Savary, indorses and transmits

of due negotiation is also superseded, where the right of recourse among the parties is preserved by any other means. Thus, regular negotiation is not necessary among co-cautioners in a debt constituted by bill, the recourse being established against each other by the bond of caution.[a] Where indorsers, however, are interested, it is no excuse for the failure in punctual notification to say, that the bill was in due time protested, and properly negotiated in other respects, or that the drawee had no effects of the drawer in his hands.[b] Neglect of due negotiation, infers the loss of recourse by the indorsee against the indorsers, even though the accepter be bankrupt,[c]

Notice when relief established by separate deed.

Want of funds not relevant in question with indorsers.

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a bill to his correspondent in Lyons, with instructions to receive and apply the proceeds as *per* advice, and the bill is protested for non-payment, it is not necessary for the correspondent to notify the dishonour to the merchant at Paris, nor can he claim recourse upon him. For the merchant at Lyons having given no value for the bill, he is not the proper creditor, and has nothing to do but to return the bill and protest to his employer, that he may take the proper steps of negotiation, and operate recourse on those from whom he derived the bill. But if the merchant at Paris was debtor to the one at Lyons, or if he had remitted the bill to retire another which he had previously drawn on him, in that case the correspondent, in order to preserve his right of recourse, is taken bound to use exact diligence in making notification, as, by his accepting the prior bill, he had become a creditor of the Parisian merchant, and debtor to the person in whose favour the prior bill was drawn. Tom. 1. liv. 3. ch. 6.—A.

But see Dunlop *v.* Hamilton & Co. *sup.* p. 109.

[a] 1803, Jarron *a.* Smith, &c. Fac. Coll. No 112, p. 246. Mor. App. to Bill of Exchange, No 14.

[b] 1761, Fairholms *a.* Sun Fire-office, Fac. Coll. No 41, p. 86. Mor. 1588. See the cases in note [d].

[c] 1748, Langley *a.* Hog, D. Falconer, v. 1. No 160. p. 352. Mor. 1574.—1803, Ferguson & Co. *a.* Belsh, Fac. Coll. No 111, p. 244. Mor. App. to Bill of Exchange, No 13. Manning, p. 42. Poth. n. 147. Boucher, n. 1482. These autho-

and whether the drawer had funds in his hands or not.[d] For though it be a good reply to a drawer objecting undue negotiation, that he had no effects in the person's hands on whom he drew, yet it is no good reply to an indorser, who is not supposed to have any effects in the hands of the drawee. There is consequently a material and obvious distinction between the drawer and indorsers of an accommodation-bill. The former receiving the money, has no right to relief from any one; but if an indorser shall pay, he has a right to operate relief against both the drawer and previous indorsers. This interest is the criterion by which to judge whether strict negotiation is necessary or not. Therefore, where bills

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rities have been confirmed in the case of Calder *v.* Lyall and others, 22d Dec. 1808, Fac. Coll., in which "the Court were unanimously of opinion, that the bankruptcy of the accepter did not supersede the necessity of strict and regular negotiation; and that no inquiry could be allowed into the amount of the damages which might have arisen from the want of it.

"It was observed, that the bankruptcy of the accepter might or might not be known to the drawer and previous indorsers, and was a fact with which it was not a presumption *juris et de jure,* that they were acquainted. That if the private knowledge of the drawer and indorsers of this fact were admitted to justify undue negotiation, and to dispense with regular notice of dishonour, this private knowledge would in every case be made the subject of inquiry and proof, and a source of litigation on bills of exchange would be created, which would be intolerable in a commercial country. That a general rule, therefore, had been established, of requiring strict and regular notice of dishonour, to which there was no exception but in the case of accommodation or wind-bills."

In like manner, the bankruptcy of the drawer is no excuse for not giving notice to him or the trustee on his estate. Bell, I. 332.

[d] 1755, Hart *a.* Glassford, Dict. v. 3. p. 84. Mor. 1580.—1773, Finlayson *a.* Ewing, *ibid.* Mor. 1597.

are merely granted for the accommodation of the drawer, he is not entitled to plead the want of regular negotiation.[e] But in so far as onerous and *bona fide* holders are concerned, accommodation-bills do not differ in the rules of negotiation from other bills.[f]

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[e] 1787, MacAdam *a.* MacWilliam, Fac. Coll. No 334, p. 514. Mor. 1613.

[f] 1791, Orr *a.* Turnbull, Session Papers. Mor. 1616. Bell's Cases, 116. In like manner, in the case of Goldsmid & Moxon & Attorney, *v.* M'Neill, Stewart, & Co., 26th May 1814, Fac. Coll., where due notice of dishonour was not given to the drawer of an accommodation-bill for behoof of the *accepter*, it was held that he was discharged. "The Court laid down this principle, that in general every holder of a bill is bound to notify the dishonour of that bill to the drawer, and he is only relieved from this necessity by proving, that the bill was for the accommodation of the drawer. But, in the present case, it was clear the bill was for behoof of the accepters, who got the money for it, in which case the holders were not relieved from the necessity of due negotiation." In the English case of Corey *v.* Scott, 3 Barnewell & Ald. 619, in which the bill was for the accommodation of an *indorser*, the Court were clear, that the drawer was entitled to notice; for, had he taken up the bill, he might certainly have sued that indorser, if not the accepter. See also Brown *v.* Maffey, 15 East, 216, in which case all the parties had lent their names for the accommodation of a remote indorsee; and it was held, that one of the indorsers against whom the claim was brought, ought to have had notice of dishonour, and that by neglect of it recourse against him was lost.

The English courts have endeavoured to narrow the exception from the rules of negotiation, which exists in favour of accommodation-bills, in order to prevent, as much as possible, the investigation into the private accounts between the parties, which such questions render necessary. If therefore the drawer had any reasonable expectation, from his transactions with the accepter, that the bill would be honoured, or if there was an existing account between him and the accepter, though the balance may have been against him, he will be held entitled to notice. Thus, notice was found necessary, where the drawer was in expectation, that goods which he had shipped would reach the drawee. Rucker *v.* Hiller, 3 Camp. 217. So in Orr and others *v.* Maginnis, 7 East, 359, in which it appeared, that

Bills indorsed in security.

Bills, indorsed in security, require to be duly negotiated; and the holder of a bill granted as a collateral security, is liable, like other holders, to strict negotiation.[h] Precepts, or drafts, drawn on factors or agents, in security or satisfaction

On factors.

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at the time of drawing, the drawer had effects in the hands of the drawees, but, from the time of presentment for acceptance till presentment for payment, he had not any; the want of a protest and notice was held fatal. Lord Ellenborough said, that no case had extended the exemption to cases, where the drawee had effects of the drawer's in his hands, at the time when the bill was drawn, though the balance might vary afterwards, and be turned into the opposite scale. The same was decided in Blackhan *v.* Doren, 2 Camp. 503, where the action was on a bill for L.250; and it appeared the drawer had effects to the amount of L.1500 in the drawees' hands, but he owed them L.10,000 or L.11,000. Neither was it held to excuse want of notice, that the effects in the drawee's hands did not amount to the sum in the bill. Thackray *v.* Blackett, 3 Camp. 164. Notice has also been found necessary, where the drawee was not possessed of funds when the bill was drawn, and when it was accepted, if he was, before it became due. Hammond *v.* Dufresne, 3 Camp. 145.

If the payee of a note take effects of the maker to answer it, as in the case of a person lending his name in this way to secure payment of a composition, and taking effects from the bankrupt for his indemnification, it has been held that such payee is not entitled to notice of dishonour of the note, because, having the funds, he is the proper person to pay it. Corney *v.* Da Costa. Esp. 302.

The exception from due negotiation in the case of accommodation-bills, holds equally with regard to an accepted and an unaccepted bill, the only difference being, that acceptance is *prima facie* evidence of funds, which the holder must disprove, whereas the *onus probandi*, in the case of non-acceptance, lies on the drawer. Bell's Comm. I. 337.

It was held by Lord Ellenborough, that a holder, for value, of an accommodation-bill, knowing the original nature of the bill, and giving delay in payment of it to the drawer, discharges the accepter, who was to be considered as a mere surety. This decision, however, has since been departed from, and the contrary seems now to be established. Bayley, 167.

[g] 1762, Murray *a.* Grosset, Dict. v. 3. p. 89, Mor. 1590.

[h] 1794, Reid *a.* Coats, *ibid.* Mor. 1620.

of debts, must also be duly negotiated, to preserve recourse against the granters.[i]

Negotiation of bills past due when indorsed.

In cases where the ordinary rules of negotiation cannot be observed, and consequently where they cannot apply,—as, where a bill is indorsed away after the term of payment is past, and is protested against the accepter for non-payment, and the indorser for recourse,—the latter will be found liable in recourse to the holder.[k] But though bills, indorsed after the term of payment, do not admit of the same strict negotiation as other bills, yet it is incumbent on the holder to notify the refusal to the indorsers within a reasonable time.[l] Where, however, all the debtors in a bill become bankrupt, and claims are entered on their estates before the term of payment, negotiation, as it can serve no end, is unnecessary; and the want of it cannot be objected by the creditors.[m]

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[i] Earl of Leven *a.* Earl of Glencairn, D. Forbes, p. 555. Mor. 1553.

[k] 1777, Cooper *a.* Clark, Dict. v. 3. p. 85. Mor. 1604.

[l] 1749, Forbes *a.* Young, *ibid.* p. 91. Mor. 1635. In this case, it was reported by London merchants, that where a bill is indorsed after the term of payment, it is not necessary for the *porteur* to protest, but only to present the bill as a letter of credit, and to demand payment, and to notify the refusal to the indorser in a reasonable time. See *sup.* p. 191-2.

[m] 1792, Creditors of MacAlpine *a.* Parsons, *ibid.* p. 88. Mor. 1617.—1794, Harrisons *a.* Chippendale, *ibid.* p. 89. Mor. 1620.

In a case where a drawer told the holder, that he had no regular residence, but lived amongst his friends, and he would call himself on the accepter, and see if the bill was paid, Lord Ellenborough held, that this dispensed with all notice, and threw it on the drawer to inquire. Phipson *v.* Kneller, 1 Stark. 116.

Form of notice.

The notification of dishonour should be specific, and ought to give the particulars of the bill; such as, the sum, date, parties' names, and period of payment, so as to make it impossible to mistake what bill is meant; and should also express when the protest was taken, and the holder's intention of claiming relief: for, unless the dishonour be notified in a manner so distinct as to leave no room for uncertainty, recourse will be lost.[n]

Case of Johnston v. Hogg.

W. MacLean of Inverness drew upon his son J. MacLean of London, on the 19th November, for L.150, payable twenty days after date, to Hogg in Edinburgh, for value in account with him, as per advice. This bill was sold, blank indorsed, to T. & A. Fairholms of Edinburgh, who transmitted it to Johnston of London, whose name came to be filled up in the blank indorsation; and was accepted by J. MacLean the drawee. The bill falling due on the 8th February, was protested on the 11th for non-payment, and an action of recourse brought against Hogg the payer and indorser, who pleaded that the dishonour of the bill had not been duly notified. To which it was answered for the pursuer, that it had been duly notified to the defender by a letter from the accepter himself, acquainting Hogg of his having been obliged to redraw on him for payment of it, and by the said draft being sent down to J. & A. Fairholms, factors for the hold-

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[n] Savary, tom. 1. liv. 3. ch. 6.

ers, and presented to him for acceptance. But as this letter from the accepter did not particularly bear that the redraft he had given to Johnston the holder was on account of the bill, but only stated, in general, that in order to retire a bill of his in Johnston's hands of L.150, he had, of that date, drawn on him for that sum, it was not sustained as sufficient notice. The Lords found, that notification of the dishonour of a bill must be distinct and positive, especially when it is given to an indorser; as the only purpose of notification to him is, that he may thereby be entitled to operate his relief against the drawer; and that no other is sufficient than what may put him in safety to sue and attach the effects of the drawer for his relief.°

Is private knowledge sufficient?

It appears, however, that private knowledge of the dishonour is tantamount to a notification.

An action of recourse was brought against the indorser of a bill, of the dishonour whereof no regular intimation had been given; yet, from private knowledge, the indorser could not be ignorant of the dishonour. The Lord Ordinary found him liable; which the Court confirmed, and found expenses due. It was observed on the Bench, that when an indorser hears nothing of a bill for some time after the term of payment, he is entitled to presume it is paid; hence, in general, without intimation, an indorser

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° 1747, Johnston *a.* Hogg, Kilker. (B. of Exch.) No 14, p. 79. Mor. 1570. See next note.

cannot be made liable. But in the present case, the parties saw each other every day, and the whole circumstances of the case came to be equivalent to regular intimation. The indorser knew, from circumstances, that the bill was dishonoured. In particular, he was present when the accepter made a partial payment.[p]

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[p] 1791, Irvine *a.* Caddel, Mor. 1617. Notwithstanding this decision (in which, besides, the Court held that the circumstances amounted to evidence, that *actual* notice by the holder had been given), it cannot be laid down as law, that mere knowledge of dishonour is equivalent to notice. In England, the contrary is clearly established, Tindal *v.* Brown, 1 T. R. 167. 186; in which notice from the holder to an indorser was too late, but the maker having, the day after the note was due, told the indorser that he could not pay it, and desired that the indorser would, it was maintained that this superseded the necessity of any other notice. Per Ashhurst, J. "Notice means something more than knowledge, because it is competent to the holder to give credit to the maker; it is not enough to say, that the maker does not intend to pay, but that the holder does not intend to give credit; the party ought to know whether the holder intends to give credit to the maker, or to resort to him." Per Buller, J. "The purpose of giving notice, is to let the party know, that he is looked to for payment, that he may have his remedy over by an early application,"—"it ought to purport, that the holder looks to him for payment, and a notice from another person cannot be sufficient; it must come from the holder." See also *ex parte* Barclay, 7 Ves. 597. Bayley, 206, says "the notice must come from the holder, or some party entitled to call for payment or reimbursement." In Rosher *v.* Kieran, 4 Camp. 87, in which it appeared that the accepter, on the day the bill became due, wrote to the drawer that he had not been able to pay the bill, and that it was in plaintiff's hands; Lord Ellenborough held this to be sufficient notice. But Bayley, 208, disapproves of that decision, unless it proceeded on the ground that the accepter wrote for the plaintiff, and as his agent.

Mr Bell, Comm. I. 330, on the strength of the English authorities, states, that "the notice of dishonour is to be given by the bill-holder, or by one who is empowered to act as his agent in that matter, or by one who has himself been called upon to answer for the bill, and who, on doing so, will have a claim of recourse. Information from a third party, not thus interested,

Evidence of notification to the drawer was likewise inferred, from an acknowledgment of his own in a posterior deed; wherein, among other sums, he debited himself with that in the bill to the holder, at the time.

Notice waived by subsequent acknowledgment.

Martin, on the 20th December 1764, drew a bill on Kellar, payable to the drawer four months after date. It was indorsed for value to Johnston, and by him to Nisbet, in whose hands it remained till it became due, 20th and 23d April 1765. Kellar, the accepter, having become bankrupt about the middle of February preceding, absconded; and Coulter having come to have right to the bill, as creditor of Nisbet, brought an action of recourse against Martin the drawer, by whom it was objected that the bill was not duly negotiated, in respect there was no proof of its dishonour being notified. To which it was answered by Coulter, that as Martin had acknowledged himself debtor to Nisbet, the last indorser, for the contents of the bill, the notification of the dishonour was thence to be presumed; and that the notoriety of the accepter's bankruptcy before the bill became due, was equivalent to an actual

Case of Coulter *v.* Martin.

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and entitled to give notice, or to act for the holder, is unavailing to preserve recourse to the proper party." In the Stirling Banking Co. *v.* Duncanson's Rep. Mor. 1611, and Bell's Cases, 111, an opinion is given from the Bench, that private knowledge, without information from the holder, would not be sufficient; and in Mackenzie *v.* Urquhart, 1731, Mor. 1561, it was expressly found, "that it was irrelevant to state that the drawer had heard of the dishonour of the bill, by means of third parties, since he was to rely on notification only from the *porteur* himself, or his order."

notification, and excluded the supposition of any damage to the drawer from the want of it. The Court went upon the particular circumstances of the case, and found, from the drawer's having acknowledged, in a disposition by him to Nisbet and others as trustees for his creditors, that he was owing Nisbet the sum of L.514, 17s. 6d., which *included* the sum in the bill in question, that sufficient evidence was adduced of the dishonour having been properly intimated to him.[q]

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[q] 1775, Coulter *a.* Martin, Fac. Coll. No 174, p. 90. Mor. 1601. The want of notice may be waived by the payment of a part, or by an undertaking to pay the whole amount of the bill after knowledge of the default. Bayley, 234. But if a party give a promise to pay, in ignorance of undue negotiation, it will not be binding, Borradaile *v.* Lowe, 4 Taunt. 93. Defendant, an indorser, after notice of dishonour, wrote to holder, "I cannot think of remitting till I receive the draft, therefore, if you think proper, you may return it to Trevor & Co. (previous indorsers) if you think me unsafe." It was afterwards discovered, that holder had not intimated in time. Mansfield, C. J., said that this letter contained no express promise to pay at all events, and he thought it would be too much to fix defendant here; in most cases, where a defendant had been held liable, there had been an express promise to pay, or a promise, under a full knowledge of being discharged, or where there was a debt, binding in conscience, due from defendant.

It has been already seen, that when payment was erroneously made, in ignorance of a neglect of due negotiation, the person paying recovered the money from the party who received it. Batchin *v.* Orr, *sup.* p. 186-7. A person in this situation, however, cannot recover what he has paid, from the parties prior to him on the bill, Roscoe *v.* Hardy, 12 East, 434. In this case, acceptance had been refused, but no notice given, and after a second presentment for payment, and refusal, the holders called on the plaintiff, as indorser, for payment, and he, being ignorant of their laches, paid the bill. He now sued the defendant as his indorser, who set up the laches of the holder as a defence, and the plaintiff was nonsuited. On motion to set aside this nonsuit, it was urged, that the plaintiff ought not to be prejudiced by the laches of subsequent holders, of which he was ignorant, without the means of information. But the Court held that his ignorance, which had prevented his availing himself of

But an execution of horning, reduced from informality, was not sustained as evidence of an intimation of the dishonour of a bill.

How notice may be proved.

The usual way of notifying the dishonour of a bill, is by a card or letter sent by the holder, when the parties live near each other; or transmitted by the post, when the parties live at a distance. In the event of the notification being denied, it may be proved, in the former case, by the person by whom the letter was delivered; in the latter, by the person who put it into the post-office; or it may be proved

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these laches as a defence, could not alter or revive the liability of defendant, who had been discharged by the same laches.

In one situation, the drawer and indorsers are precluded from pleading undue negotiation, viz. when a holder, having presented a bill for *acceptance*, indorses it away for value to a *bona fide* indorsee, without giving notice to the other parties of a refusal. The indorsee, who is not liable for objections, not appearing on the face of the bill, cannot be met by his indorser's misconduct. O'Keefe *v.* Dunn, 6 Taunt. 305.

[r] 1784, the Stirling Banking Company *a.* Duncanson's representatives, Bell's Cas. p. 111. Session Papers in Signet Hall. Mor. 1611. It was so decided, because the Court were not satisfied, in the circumstances of the case, that any notice or charge to pay had been given at all. The whole judges agreed, that even verbal notice, if proved, would have been sufficient intimation.

[s] Chitty, 408. Kyd, p. 273. When notice is sent by post, it is not necessary for the holder to prove the receipt of the letter; but it would appear that the actual receipt of the notice must be proved, when intimation is sent by a private person, or an irregular conveyance. Bayley, 227-8. When notice must be sent abroad, it is sufficient to send it by the first regular ship, though, if sent by another ship bound elsewhere, it would by accident have arrived sooner, and though the holder wrote other letters to the same place by that ship. Muilman *v.* D'Eguino, 2 H. Bl. 565.

Verbal notice of dishonour is quite sufficient, and may be proved anyhow, Sym *v.* Ferguson, 25th June 1813, Fac. Coll.; in which case the Lord Ordinary found, that it must be proved that the dishonour was intimated by letter. But the Court

by the holder's letter-book. But where none of these modes of proof can be had, it would seem that the oath of the holder, or of the agent employed by him, will be received as sufficient evidence of intimation having been given.[t]

Case of Colebrooke & Co. v. Douglas.

A bill drawn on a house in London had been indorsed by W. and J. Douglas in Glasgow, to Brown, agent in the same town for Douglas, Heron, & Co., when it was again indorsed to Sir George Colebrooke & Co. in London. The bill being presented to the drawees, first for acceptance and then for payment, both were refused; upon which Colebrooke & Co. used diligence against W. and J. Douglas, who brought a suspension of it, on the ground that due intimation of the dishonour had not been made to them. Colebrooke & Co., the chargers, on the contrary, affirmed, that timely notice of both refusals had been given to the suspenders by Brown, their

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were clearly of opinion, that it was not necessary to intimate the dishonour of a bill in writing; and they altered the interlocutor of the Lord Ordinary, and remitted to his Lordship to allow a proof generally of the intimation. In the English case of Goldsmith & al. *v.* Bland & al. at Guildhall, cor. Lord Eldon, 1st March 1800, it was held sufficient, that a clerk went to the indorser's counting-house in business hours, and finding nobody there, came away without leaving any message. In Stewart *v.* Wright and Scott, 13th December 1821, Shaw's Rep. I. 213, the evidence of notice having been sent was, a certified copy of a letter of intimation by Wright (who absconded before he was examined as a witness under an order to that effect), a marking on the back of the bill by him, and the testimony of a single witness, who swore he saw the letter written and put into the post-office. The Lord Ordinary held this sufficient, and the Court, by a majority, adhered.

[t] This alone, it is thought, would not be sufficient to prove intimation. In the two cases referred to, the oaths were taken only in *corroboration* of markings made at the time.

door-neighbour, being communicated to him by the cashier at Edinburgh, who had received it from London; in support of which averment, they produced the cashier's letters to Brown, with a notandum added to each of them in Brown's hand-writing, bearing, that he had read or shown them to the suspenders. And they concluded, that this evidence ought to be held as sufficient; at least, that it might be rendered complete by the oath of Brown. The Court was of opinion, that the alleged mode of intimating the dishonour was sufficiently formal; and that, if the evidence arising from the markings, affixed by Brown to the cashier's letters, were corroborated by Brown's oath, this would be satisfactory evidence of such intimation. And he having given his oath, W. and J. Douglas were found liable.[u]

The oath of a partner, in corroboration of a private marking of his own, will also be received as sufficient evidence of due notification.[v]

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[u] 1780, Colebrooke & Co. *a.* Douglas, Fac. Coll. No 118, p. 217. Mor. 1605.

[v] 1781, Douglas, Heron, & Co. *a.* Alexander, *ibid.* No 34, p. 59. Mor. 1606.

Notice to one of several partners is notice to all; and when a bill has been drawn by a firm upon one of the partners, and by him accepted and dishonoured, it is unnecessary to give notice of such dishonour to the firm, for this must necessarily be known to one of them, and the knowledge of one is the knowledge of all. Bayley, 230. It is sufficient to give notice to a clerk in the counting-house of the drawer or indorser. But it would not seem to be sufficient to give notice to a clerk met in the street, or in any other place not appropriate to his master's business. Bell's Comm. I. 331.

Whether bill and protest must be returned to drawer.

When notification is made, it is not necessary for the holder of the dishonoured bill, in pursuing recourse, to return the bill and protest to the drawer, unless he pay the amount. These are the holder's documents of debt, which he cannot safely, and is not bound to part with, until actual payment is received.[w]

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[w] 1757, Hawkins & Co. *a.* Cochran, Sel. Dec. No 130, p. 186, Mor. 1581. 1760, Coutts & Co. *a.* Nisbet, Fac. Coll. No 262, p. 488, Mor. 1586.

It is proper to send a copy of the protest along with the notice of dishonour, particularly if the party to whom notice is sent be abroad. It is, however, sufficient to state the fact of the protest having been taken; and even this has been held not indispensable, when the party was not in a foreign country, and when it does not appear that he had asked for a copy of the protest. Robins *v.* Gibson, 1 M. & S. 288. This was an action against the drawer of a foreign bill, who, it appeared, was at Buenos Ayres, where he drew the bill, but had returned to England before it fell due. Notice of the dishonour only was sent him. Verdict for plaintiff; and, on motion for new trial, Lord Ellenborough said, it did not appear that the defendant requested to have the protest, and it would be hazarding too much to leave it without some request. He had due notice of the fact of dishonour of the bill, and as the circumstances of parties alter, the rule respecting notice also changes, according to the convenience of the case. If the party is abroad, he cannot know of the fact of the bill's having been protested, except by having notice of the protest itself; but if he be at home, it is easy for him, by making inquiry, to ascertain that fact. Rule refused.

# CHAP. IX.

## OF THE PRIVILEGES OF BILLS.

BESIDES the privileges of bills that we have already had occasion to mention, these documents are peculiarly privileged in other respects, of which it is extremely necessary that some notice should be taken.

Bills prove their dates.

It has been shown,[a] that bills are complete in themselves, without witnesses, or any of the statutory formalities essential to the constitution and validity of other writs. They prove their own dates, whether they be holograph of the drawer or not; whereas holograph deeds of any other description, do not prove their dates, unless attested by witnesses. But though this rule, with regard to the date of bills, be necessary for the security of merchants in their transactions with proper bills of exchange, it seems doubtful how far, in questions with heirs or creditors, it ought to extend to these instruments, when em-

Questions between heirs or creditors.

[a] Ch. III. p. 74.

ployed merely to constitute, and as vouchers of debt, such as bills payable to the drawer, and promissory-notes. For by antedating notes and bills of this description, the most easy and dangerous modes of affecting the rights of heirs, and defrauding creditors, might be introduced. Heirs, for instance, might be cut off from the plea of death-bed; inhibiting creditors from the benefit of their legal diligence; and husbands sued for the personal obligations of the wife, might be deprived of the defence, that such obligations had been granted subsequent to marriage.[b]

For these reasons, apparently, it has been decided, that a bill granted on death-bed does not prove its onerous cause;[c] and that it is competent to prove by witnesses, against an onerous indorsee, that a bill was granted on death-bed as a legacy, was not delivered, and was not signed by the drawer during the granter's life.[d]

Date of acceptance.

As the acceptances of bills, payable at a certain period after date to the drawer, are seldom dated, questions have arisen whether or not the acceptance is in all cases to be presumed of the date of the bill. In a cause that was determined in 1702, the Court refused to sustain this presumption,

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[b] Esrk. b. 3. t. 2. § 22. 25.

[c] 1734, Christisons *a.* Ker, Dict. v. 2. p. 255. Mor. 3226.

[d] 1757, Farquhar *a.* Shaw, Kam. S. Dec. No 137, p. 193. Mor. 12341.—See also Duncan *a.* His Majesty's Advocate, 1754, Fac. Coll. No 103, p. 152; Mor. 12289. A *bona fide* indorsee will not be affected by the circumstances mentioned in the text. See Shaw *v.* Farquhar, 24th Nov. 1761. Mor. 1444, *sup.* p. 92.

unless it was supported by proof.[e] But, in a subsequent case, it was found, that an accepted bill proved its own date against the accepter's heirs;[f] and from this authority, as well as from the analogy of indorsations, it may be considered as a rule, that an acceptance of an inland bill, payable to the drawer, if not dated, will be considered of the date of the bill; and, where it is dated, will be held as of that date till the contrary be proved.[g]

What remains to be observed, concerning the privileges of bills, may be conveniently comprised and discussed under the four following heads:—1*st*, Whether bills require intimation; 2*dly*, How far bills are subject to compensation; 3*dly*, How far bills are arrestable; and, 4*thly*, For what period bills retain their extraordinary privileges.

Nature of intimation.

I. *Whether bills require intimation.* By the law of Scotland, the possessor of any right may, in general, assign or dispose of it at his pleasure. By such assignation, the subject assigned is fully vested in the assignee; and, in personal rights, this transference is completed by delivery of the right assigned, together with the deed conveying it. But as debtors are not presumed to know that their debt has been made over to a third party, and therefore cannot, by the conveyance,

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[e] Man *a.* Wales, Dict. v. 1. p. 90. Mor. 1006. See ch. xii.
[f] 1725, Kennedy *a.* Arbuthnot, Edgar, p. 185. Mor. 1477.
[g] 1794, Thistle Bank *a.* Leny, Bell's Cases.—See also Norris *a.* Heirs of Sir John Wood, Dict. v. 4. p. 168. Mor. 4466.

be put *in mala fide* to pay to the original creditor, it is necessary that the assignation be intimated or notified to the debtor, to let him know that he must make payment, not to the first creditor, but to the assignee who has now come in his place. In the assignation of common debts, this intimation is an essential requisite, not only for interpelling the debtor from paying to the original creditor, but for completing the conveyance. Hence, though an assignation not intimated be valid against the granter, who cannot quarrel his own deed, yet if, before intimation of a first assignment, the assigner shall grant a second one of the same subject to a different assignee, the second assignment, if first intimated, is preferable to the first.

Bills require no intimation,

Bills, according to our two highest legal authorities,[h] require no intimation, but effect a complete transference of the right without this otherwise necessary formality. It is certainly true, that the indorsement of an accepted bill of exchange is a complete assignation of the right to its contents in favour of the indorsee; and, from the privileges of bills, this assignation does not stand in need of being intimated to the accepter. But the doctrine of no intimation being necessary, in any conveyance by bill, seems to be rather questionable. The act of drawing a bill in favour of a payee, is an assignment to him of the funds which the drawer may have in the hands

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[h] Stair, b. 1. t. 11. § 7. and b. 3. t. 1. § 12.—Ersk. b. 3. t. 5. § 6.

of the person drawn upon. But this assignment is not completed, so as to secure the payee, until the bill is presented to the drawee for acceptance, and intimation thereby given to him that the drawer, by the draft, has transferred the debt to the holder; for, until such intimation be made, he cannot be supposed to know of the debt being assigned; and, therefore, may either pay to a person holding a subsequent draft, or to another creditor of the drawer who may have attached the amount in his hands.

except when unaccepted.

Burn drew a bill, dated 30th July 1731, on Dalziel, payable to Ker of Houndwood, or order, betwixt and Martinmas then next, which was presented and protested for non-acceptance 6th May 1732.

Case of Ker *v.* Chalmers.

Burn drew another bill, dated 6th August 1731, upon Dalziel, payable to Parkhill, or order, against Whitsunday thereafter, which was indorsed by the payee to Chalmers, and protested for non-acceptance 7th August 1731.

Ker, the pursuer of an action, as representative of Ker of Houndwood, to whom the first bill was payable, in a competition before the Sheriff, pleaded preference on the debt due by Dalziel, as having the first bill drawn upon him. The Sheriff preferred Chalmers, holder of the second bill, as having the first protest for non-acceptance; which decision was affirmed by the Lord Ordinary in an advocation.[i]

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[i] 1737, Ker *a* Chalmers, Dict. v. 1. p. 97.—Session Papers.—Mor. 1465.

In this case, it was urged for Chalmers, that the debt due by Dalziel to Burn was not constituted by bill; and no conveyance of a debt, not constituted by bill, can have the privilege of indorsation of a bill, so as to be effectual without intimation. A bill not indorsed, would not be preferable to an assignation intimated before the bill was presented to the debtor, consequently would not be preferable to a bill, posterior in date, first intimated. It is of no importance that Mr Ker's bill was first payable; for the second bill contained no information to acquaint the persons to whom it was directed, that any former bill had been drawn. It was a simple draft, to pay a certain sum at a certain day. It was presented, and intimated to the debtor, before the prior bill. The first intimation completed the conveyance, whatever was the term of payment; nor can the time when the competition occurred make any difference.

Protested bill equal to assignation.

The protesting of a bill for non-acceptance is equivalent to an intimated assignation;[k] and even a verbal intimation of a draft is sufficient notice to the drawee.[l]

Indorsee to unaccepted bill.

One might apprehend that the indorsee of an unaccepted bill could be in no better situation than the indorser from whom he derives his

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[k] 1734, Mitchell *a.* Mitchell, Dict. vol. 1. p. 97. Mor. 1464, 1768, Gavin *a.* Kippen and Co. Fac. Coll. No 79, p. 327, Mor. 1495. 1778, Spotiswood *a.* MacNeil, *ibid.* No 18, p. 33. Mor. *ibid.*

[l] 1724, Fairholm *a.* Gordon, Edgar, p. 20. Mor. 1462. Bell's Com. I. 309.

right; and that if, to interpel the drawee from paying *bona fide* to a posterior order, intimation be necessary, the necessity holds as much in regard to the indorsee, as to the original payee, in whose place he stands. This conclusion, however, though it seems sufficiently tenable on reasonable principles, does not appear to be supported by any authority. It has been found, that the indorsee of an unaccepted bill not intimated, was preferable to a posterior arrester who had attached the funds in the debtor's hands.[m] There is evidently, however, no ground of expediency for any distinction betwixt a payee and an indorsee; for though indorsations are, from motives of utility, more privileged in some instances than bills themselves, yet, if intimation be at all requisite to put the drawee *in mala fide* to pay to a posterior order or arrester, there is no reason why an indorsee should not be bound to intimate, as well as the person to whom the bill was originally made payable.[n] At all events, the consideration of the foregoing cases more strongly enforces what has already been frequently inculcated, that as soon as a bill or draft is received, it should, without the smallest delay, be

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[m] 1698, Ewing *a.* Geills, Fountainhall, v. ii. p. 11. Mor. 1460.

[n] The two cases seem to be so identically the same in principle, that the decision in Ker *v.* Chalmers, *sup.*, must be held to overrule that in Ewing *v.* Geills. On the same ground, that a posterior draft, first intimated, excludes a prior, an arrestment in the drawee's hands, for a debt of the drawer, executed before a bill is presented, will also be preferable to it. Bell's Comm. II. 243.

presented by the holder for acceptance, and, in case of refusal, protested; as, by this means, the holder not only preserves his right of recourse against the drawer, but, by the intimation given by the presentment and protest, effectually precludes the drawee from paying to another, in case he has funds in his hands; and a double security is thus afforded to the holder for his money.

Effect of protested bill.

A bill, protested for non-acceptance, divests the drawer of the funds for which the bill was drawn, in favour of the payee, so as to exclude other claimants.[o] But this doctrine is also liable to exceptions; for if the draft be for a greater sum than is in the hands of the drawee, and the holder does not, within a reasonable time, limit his demand to the sums acknowledged to be due

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[o] 1724, Stewart *a.* Elliot, Edgar, p. 32; Mor. 1463.—Fallope & Co. of Paris, drew upon the house of Guignes of Leghorn, on the 14th Messidor of the year 5 (1st July 1796), a bill of exchange, at sight, for 5200 piastres, payable to the order of Francis Devink. On the 18th of the same month, Fallope & Co. failed. On the 28th, Neveu & Co. of Geneva attached in the hands of Guignes the whole sums owing to the house of Fallope & Co. The bill, of which Devink was the holder, was presented by him for acceptance; and on the answer made by Guignes, the drawee, that his hands were tied up by the attachment, it was protested for non-acceptance. Neveu & Co. afterwards loosed the arrestment, and obtained payment of the funds belonging to Fallope & Co. Devink being himself a debtor of the house of Neveu & Co. in an account-current with them, passed to his credit the 28,000 francs, the amount of the 2500 piastres for which the bill was drawn. Neveu & Co. having refused to admit this, the question came to be tried before the Tribunal of Commerce, of the department of the Seine, which decided, that Neveu & Co. should allow Devink credit for the above sum, which had been carried by the bill in his favour, drawn on the house of Guignes. And, upon an appeal, this judgment was affirmed by the Tribunal of Paris. Journal du Palais, Boucher, p. 211.—A.

by the former, these sums will not be attached or carried by the draft.

Case of Hog v. Fraser.

Hogg, in consequence of an order from S. Fraser, drew bills for L.154 on J. Fraser, who refused to accept, because the sums in his hands belonging to S. Fraser amounted only to L.55, 7s. 2d. But he offered, for the accommodation of his correspondent, to honour a bill of exchange for L.100; which, however, he was not required to do. Hogg took no further measures for 13 months. By this time, S. Fraser had become insolvent, after J. Fraser had interposed his credit for him to a considerable amount. An action was then brought by Hogg, in which, in order to subject J. Fraser to the payment of L.55 : 7 : 2, it was pleaded, That the drawing of a bill of exchange, or, what is the same thing, the giving authority to make such a draft, is equal to an irrevocable assignment of those effects of the drawer, which are at the time in the hands of the drawee. To which it was answered, That if the pursuer had, within a reasonable time, limited his demand to the sums acknowledged to be due by the drawee, his present claim might have been deemed a just one. But it would be attended with the most pernicious consequences, if, by such unfinished transactions as here occurred, any restraint should be introduced on the freedom of commercial dealings. The Court sustained the defence, and found the pursuer liable in expences.[p]

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[p] 1786, Fac. Coll. No 296, p. 455. Mor. 1521.

Whether a protested bill carries effects.

And where the person drawn upon has not money, but effects, of the drawer in his hands, these effects will not be carried or attached by the draft, in preference to a posterior arrestment of them.

Fall & Co., merchants in Dunbar, had in their hands a parcel of dry fish belonging to Sinclair, which they had undertaken to transport to Barcelona on Sinclair's risk, and to account to him for the proceeds. Sinclair drew a bill on Fall & Co., payable to Ewing, which the Falls having refused to accept, as they had no cash in their hands at the time, Ewing protested for non-acceptance.

About a month thereafter, and while the fish were still on hand, Stewart, a creditor of Sinclair's, arrested in the hands of Falls.

In a competition that ensued between the holder of the bill and the arrester, the Lords having remitted to the Ordinary to take the opinion of merchants, Whether a bill protested for not-acceptance against a person who has only effects and not value in his hands, is, by the custom of merchants, equivalent to an intimated assignation to these effects, so as to prefer the holder of the bill to one who thereafter arrests before the effects be turned into money? The most noted merchants of Edinburgh made answer, That they always understood, that protesting a bill drawn upon a correspondent, for answering which he had in his hands a cargo that may produce money, was sufficient to affect such goods, or the produce

of them, when turned into cash, without the form of an arrestment; and that they had relied on bills so protested, as equal to an assignation intimated.

Notwithstanding this opinion, the Court found, "That the protesting the bill against Fall & Co. for not-acceptance, when they had no money of the drawer's in their hands, did not affect the parcel of fish in question, then in their hands, so as to prefer the *porteur* of that bill to a subsequent arrester; and therefore preferred the arrester to the sum of L.63, being the value of the fish, now turned into money."

Lord Kilkerran, in reporting this case, makes the following observations:—"The ground the Lords went on was, not what had been chiefly argued for the arrester, That a correspondent who has no cash but only effects in hands, is not bound to accept a bill: for neither is he bound to accept even where he has cash of the drawer's, when the bill is drawn for a greater sum; yet the draft and protest will be an effectual conveyance to the extent of the sum in his hands. But the ground was this, That an assignation to a sum of money as due by a third party to the cedent, will in no case imply a conveyance to effects of the cedent's that may happen to be in his hands; and the implied assignation by drawing a bill, cannot have a stronger effect than an assignation itself, to so much money as due by the person on whom the bill was drawn would have had;—*Cum fictio in causa ficto*, &c.

"It was at the same time admitted, that where, in such a case, the effects are, after protesting the bill, turned into money, action would lie to the holder of the bill, where no mid impediment had intervened. Not that the drawing of the bill implied an assignation to the effects; for such action would lie to the holder of the bill, when the correspondent on whom it was drawn came afterwards to have the drawer's cash in his hands, though, at the time the bill was protested for not-acceptance, he had neither cash nor effects of the drawer's; while yet, for certain, such draft would not import an assignation to money that came only into the correspondent's hands after the protest for not-acceptance: but on this ground, that the mandate, or order to pay, is supposed to continue, and will have effect, how soon the correspondent comes to be possessed of value; but still under this exception, unless a mid impediment has intervened: and such the arrestment was considered to be in this case, as it is a habile diligence to affect the subject, and is, for that reason, preferable to the action. And therefore it was, that, by the interlocutor here pronounced, it was only found, that the protesting of the bill did not affect the fish, *so as to prefer the porteur to the subsequent arrestment.*[q]"

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[q] 1744, Stewart & Ewing Competing. Kilkerr. (Bill of Exch.) No 10. 75. Mor. 1493. This case deserves the particular attention of merchants, as it seems to clash in some respects with mercantile principles and practice. The observation of Lord Kilkerran is no doubt just, that an assignation to a sum of

It has been already observed,[r] that bills or precepts for fungibles have not the privileges of bills of exchange; and therefore, a precept drawn by one person in favour of another, ordering a third to account to him for 190 bolls of salt, and 51 stones of iron, was found to require intimation; and a posterior arrestment of the debt and effects was sustained.[s]

Bills for fungibles require intimation.

Bank-notes or bank-bills, which law considers as cash or ready money, are fully transferred by mere delivery, without any intimation. And even where one offers a proof that a particular note had been his property, and was taken from him either by stealth or violence, though payment may be refused to him who was guilty of the theft or robbery, yet the note, the moment it is out of his hands, is no longer affected by the circumstance, or, like other moveables, sub-

Bank-notes need no intimation.

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money due by a third party to the assignor, does not imply a conveyance to the assignor's effects in his hands; and that the implied assignment by drawing a bill, cannot have a stronger effect than an assignation itself. But it certainly often happens, in the exuberant confidence of commercial transactions, that bills are drawn on the consignee of a cargo, and taken in payments from the drawer by indorsees, on the faith and supposition, that the consignment will cover and secure the debt. If the drafts, however, and the intimation of them, are not to be considered as a sufficient transference of the property to the holders, so as to exclude posterior claimants, it might tend materially to diminish the confidence and interrupt the despatch of mercantile dealings.—A.

In Campbell, Thomson, & Co. *v.* Glass & Son, 28th May, 1803. Mor. App. to Implied Assignation, No 2, a protested bill was held to give a preferable right to the holder, over a sum of money in the drawee's hands, though not due, to that given by a posterior arrestment.

[r] Ch. III. p. 53.

[s] 1706, Anderson *a.* Turnbull, Dict. v. 1. p. 96. Mor. 1460.

ject to a *rei vindicatio,* but must be paid to the holder;[t] which arises both from the nature of bank-notes, and from the plain intention of the law authorising banks.[u]

Summary of law on this subject.

If, then, the decision in the case of Ker *a.* Chalmers is to be received as authority, and there appears no good cause why it should not, the following deductions may be drawn from the preceding paragraphs:—

I. That a protest for non-acceptance is equivalent to an intimated assignation, so as to debar the drawee from paying to a subsequent order, and to exclude the claims of other parties; but where effects, and not money, are in the hands of the drawee, an intimation by protest is not preferable to a posterior arrestment of the effects. 2. That, as in the case of common assignations, the first intimation of a bill or draft is preferable to a prior bill last intimated. 3. That a simple indorsation on a bill makes a full conveyance without the necessity of intimation,[v] though a bill not indorsed would not be preferable to an assignation intimated before the bill was presented. 4. That a bill, when intimated, divests the drawer of the money for which the bill was

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[t] 1749, Crawfurd *a.* the Royal Bank, *ibid.* v. 3, p. 47. Mor. 875.

[u] Ersk. b. 3, t. 5, § 6. The transference of bills already accepted is, in like manner, completed by the mere indorsation of the holder, without intimation to the accepter. And bills blank indorsed, which have been lost or stolen, pass, without challenge, to a *bona fide* acquirer. See *sup.* p. 154.

[v] See *sup.* p. 241, note [n].

drawn; but if the holder does not, within a reasonable time, limit his demand to the amount acknowledged by the drawee, the sum in his hands will not be attached. 5. That bank-bills and notes are transferable by mere delivery, without intimation. And, 6, That bills or precepts drawn for fungibles, in all cases require intimation, to exclude the diligence of other creditors.

II. *How far bills may be compensated.*—Compensation is defined to be the contribution and concurrence of debit and credit, between any two parties who are reciprocally debtor and creditor to each other at the same time, and each in his own right, in debts which are of the same species and quality, so as that the one may be set off against, or pleaded by way of exception to, payment of the other. Bills are so far privileged, that in the hands of an onerous indorsee, they cannot be compensated by any debt owing to the accepter by the original creditor.[w] Where only two parties are concerned, however, all objections are competent, *hinc inde*, by the one against the other, as in common contracts; and the accepter of a bill, or granter of a note, may set off any liquid and acknowledged debt owing to him by the drawer of the bill or payee of the note, in payment and extinction in full, or, *pro*

Definition of compensation.

Whether competent to accepter of a bill.

[w] 1699, Stewart *a.* Gordon, Dict. v. i. p. 98. Mor. 1497. —1748, Tudhope *a.* Turnbull, Kilkerr. No 61, p. 81. Mor. 1510.

*tanto*, of the sum in the bill or note.[x] But compensation of a bill cannot be pleaded upon an open account, against which the triennial prescription has run before the date of the bill.[y] And in the suspension of a charge on a bond, where the suspender craved compensation of a sum due to him by the charger *per* bill, the charger was allowed to plead recompensation, because he was cautioner for the suspender in a bond for a greater sum, and therefore was entitled to retention of the sum in the bill, till he was relieved of that cautionary obligation.[z]

Whether competent after term of payment.

Formerly, when bills had been allowed to lie over for some considerable time, without diligence having been used, compensation was received against them as common debts;[a] but since the 12th of George III., by which bills retain their extraordinary privileges for six years,[b] it has been found that compensation is not pleadable against the onerous indorsee of a bill, though it may have lain over two years after its date, and eighteen months after the time of payment, without any demand being made, or diligence used.[c]

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[x] 1706, Plumber *a.* Houston, Dict. v. i. p. 98. Mor. 1498.—1714, Arbuthnot *a.* Newgrange, *ibid.* Mor. 1505.

[y] 1773, Clark *a.* Buchanan, *ibid.* v. iii. p. 150. Mor. 2664.

[z] 1711, Irvine *a.* Menzies, *ibid.* v. i. p. 168. Mor. 2686.

[a] 1749, Thomson *a.* Colvil, Mor. 1632.—1762, Smith *a.* Douglas, *ibid.* v. iii. p. 91. Mor. 1644.

[b] 1787, Robertson *a.* MacGlashan, Fac. Coll. No 309, p. 477. Mor. 1648.

[c] 1777, Elliot *a.* Mackay, Dict. v. iii. p. 91. Mor. 1648. See *sup.* p. 148, note [k].

Bank-notes, payable to the bearer, are obviously exempted from compensation; and one who grants a draft on his banker, payable to the bearer, or his order, on demand, is not entitled to plead compensation, in a question with an onerous holder of it, upon a debt due to him by the person to whom the draft was originally delivered.[d] Nor can the accepter of bills indorsed by the drawer, before the term of payment, to his creditors' factor, upon a receipt, bearing that the value, when paid, should be remitted to the creditors on account of the debt, plead compensation on a relative bill, of the same date, granted to himself, partly as creditor of the drawer in a balance due on former transactions, and partly in consideration of his own acceptances.

Bank-notes not liable to compensation.

Crosbie, on 2d December 1773, granted two acceptances to Sheriff for L.150 each, the one payable at three, and the other at six months after date; and Sheriff, on the other hand, granted his acceptance to Crosbie for L.700. The two bills, accepted by Crosbie, were soon after indorsed by Sheriff to Sir William Forbes, James Hunter, and Co., who granted the following receipt:—"Received from Mr Alexander Sheriff his two bills on, and accepted by, Andrew Crosbie, Esq., L.150 each, which, when paid, we shall remit the value to Herries & Co., on account of the debt owing them by Messrs

Case of Herries & Co. *v.* Crosbie.

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[d] 1794, MacGilchrist *a.* Arthur, Fac. Coll. No 89, p. 200. Mor. 877. *Sup.* p. 37, note [g].

Sheriff and Guthrie." Sheriff failed in February thereafter; and, upon the 1st March, a protest was taken against Sir William Forbes & Co., stating, in substance, that Crosbie had only accepted these two bills, to enable Sheriff to raise L.300 by discounting them, to pay a bill which he owed to Mansfield, Hunter, & Co., for which he and another gentleman were bound; and being a creditor of Sheriff himself in L.400, had got a bill of the same date with the two L.150 bills from Sheriff for L.700, as the amount of these two bills, and the debt of L.400, being the balance due to Crosbie on former transactions; and, therefore, that he was entitled to compensate the two L.150 bills with the L.700 bill, as the two coeval bills had not been purchased in the way of commerce, but indorsed in security of a prior debt. Crosbie, in order to take the opinion of the Court upon his plea of compensation, presented a bill of suspension of the two bills accepted by him. The Lords repelled the defence of compensation.[e]

In the diversified transactions of merchants, many complicated questions have occurred with regard to the claims of compensation and retention upon bills in bankruptcies. For information relative to these, a reference is made to that part of the work which treats of cross-ranking, under the title of "Bills in relation to Bankruptcy."

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[e] 1775, Herries & Co. *a.* Crosbie, Fac. Coll. No 162, p. 44. Mor. 2577.

III. *How far bills are arrestable.*—Arrestment, as a diligence competent to a creditor, is the command of a judge, issued at the instance of the creditor, by which he, who is indebted in a sum of money, or other personal obligation to the arrester's debtor, is prohibited from paying the debt, or performing the obligation, till the debt due to the arrester be paid or secured. The person in whose hands the diligence is used is called the arrestee. Nature of arrestment.

Bills, according to Erskine, are not arrestable; for being considered as bags of money, which pass from hand to hand, they cannot be affected by any burden in the person of the possessor.[f] It seems to be a favourite phrase with our lawyers, to compare bills to bags of money; but the similitude is rather injudicious in some cases, and in none more so than in the present case. A bag of money belonging to a debtor may evidently be arrested in the hands of a third party, but it is not so certain that a bill can; which arises from a principle of dissimilitude, rather than of similarity. Bills, as peculiar instruments of commerce, are favoured in a way that bags of money certainly are not. As a general rule, and Whether bills arrestable.

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[f] B. 3, t. 6, § 7.

Two distinct questions arise out of this opinion of Erskine, 1*st*, When a bill is payable, or indorsed in full or blank, to a factor or trustee for the true creditor, whether creditors of the latter can attach the claim, by arrestment, in the hands either of the accepter or of the bill-holder? 2*d*, When a bill is payable to the creditor himself, and is in his own hands unindorsed, whether his creditors can validly arrest in the accepter's hands? For the second of these questions see *post*. p. 261.

wherever the privileges of bills are concerned, the doctrine laid down by Erskine, that bills are not arrestable, is sufficiently correct; but, like other general rules, it appears to admit of exceptions. It is easy to figure a variety of cases where a debt constituted by bill may be affected by arrestment. For instance, an agent in this country sells goods on commission for a house in England to the extent of L.5000, and takes bills from the purchasers for the price, which he indorses to a third party for his behoof, and afterwards fails or absconds. The English house uses arrestments in the hands of the gratuitous indorsee, with the view of attaching the debt in his custody. It would be hard to say that this arrestment was of no avail, upon the general brocard, that bills are not arrestable, and that the sum in the arrestee's hands could not be secured by this diligence, merely because the debt was constituted by bill. On the contrary, it may be presumed that such an arrestment would, upon equitable principles, be sustained as perfectly valid; and that the gratuitous indorsee would be made liable in breach of arrestment if he afterwards indorsed away the bills.[g]

Whether bills in the hands of a trustee arrestable.

Cases.

The decisions upon the point are by no means uniform, and, indeed, are rather at variance with

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[g] This opinion of the author is not correct. The case he supposes is identical in principle with those of Haddow *v.* Campbell & Co., and Dick *v.* Goodall & Co., *post.* p. 257, and 260.

If the indorsee had actually received payment, the arrestment would be effectual.

each other. In the case of Jamieson *a.* Leckie,[h] it was decided, that bills deposited, blank indorsed, cannot be arrested in the hands of the depositary. By a subsequent decision, it was found that an arrestment in the hands of a trustee will carry the sum in a bill not due, in preference to an arrestment in his hands after the bill was paid to him.

Case of Gordon *v.* Innes.

Bills were drawn by Gordon on certain persons indebted to him, payable to Falconer, which, by Falconer's oath, were ascertained to be for the drawer's behoof. Innes, a creditor of Gordon, arrested in Falconer's hands after the draft, but before Falconer had recovered payment from the debtors. The question was, if these arrestments in Falconer's hands affected the sums in the bills? The Lords found that the arrestments did affect the sums in the bills,—for this reason, that, by the very drawing of the bills by Gordon upon his debtors, the right to the money was transferred to Falconer, who thereby became liable to account; and, for that reason, arrestment in Falconer's hands was not only

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[h] 1729, Dict. v. i. p. 56. Mor. 711. In opposition to this case, Mr Bell, in his Commentaries, v. ii. p. 358 (note), mentions that of Douglas, Heron, & Co. *a.* Malcolm, 9th March, 1782, which is not reported. Malcolm having in his possession bills to the amount of L.4000 belonging to Brown, an arrestment was used in his hands by Douglas, Heron, & Co. The arrestee having notwithstanding delivered the bills to Brown, was found liable in breach of arrestment.—A.

Mr Bell, Comm. II. 77. (4th ed.), observes, that "on inquiring concerning this case, I am assured by Lord Craigie, that the decision went on circumstances of gross fraud, not on the point of law."

Whether bills in the hands of a trustee arrestable.

thought habile, but to be the proper method of affecting the money; though it was at the same time observed, that, had arrestments been used in the hands of the debtors, it might, *favore creditorum*, have been sustained, evidence being given that Falconer was but an interposed person.[i]

In a still later case, an arrestment in the hands of a factor or agent, of bills blank indorsed lodged with him, and bills drawn payable to him, in order to receive payment, was found inept (of no effect);[k] but arrestments used after he had received payment, was sustained.[l]

From what was stated in the case of Creditors of Gordon *a.* Innes, it would appear, that where the peculiar privileges of bills are not in question, an arrestment in the accepter's hands would be good. This seems to be corroborated by a subsequent decision, where, however, there were special circumstances. A debtor having em-

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[i] 1740, Creditors of Gordon *a.* Innes, Kilkerr. (Arrestment.) No 8, p. 30. Mor. 715.

[k] 1767, Thorold, &c. *a.* Forrest & Sinclair, Dict. v. iii. p. 41. Mor. 753. This case, as reported in the Faculty Collection, makes no mention of the decision on the point relative to the arrestment of bills. The doctrine it tends to establish is, that the arresters of debts in Scotland, due to an English house, are preferable to the assigness under a commission of bankruptcy in England,—a doctrine, the principle of which was afterwards entirely departed from, particularly in the cases Rhone *a.* Parish & Schreiber, 6th August 1776, Mor. 4593, and Reid *a.* Struthers, 1st July 1803. The case of Scott *a.* Small, 1779, mentioned in the Dictionary, does not appear to have been collected.—A.

[l] 1768, Fac. Coll. Pewtress & Roberts *a.* Thorold, &c. Fac. Coll. No 72, p. 315. Mor. 757. (note.)

ployed, to sell goods for him, a person who took from the purchaser a bill for the amount payable to himself, an arrestment was laid in the hands of the holder of the bill, and afterwards an arrestment was used by another party, in the hands of the purchaser who had accepted the bill. The last arrestment in the hands of the accepter was preferred.[1] But an arrestment of a bill before payment, and after acceptance, in the hands of a consignee, who had a right to part of the contents of the bill, was of no effect.

Case of Haddow v. Campbell & Co.

Macintosh of Antigua remitted to Allans & Gow of Glasgow, to whom he owed L.38, 12s., a bill for L.200 on Drummond & Co. of London. The bill was enclosed in a letter, which mentioned, that he meant soon to draw on them in favour of his other creditors. The bill was received by Allans & Gow on 2d January, and was payable 10th March, 1794. On the 25th February, 1794, after the bill had been accepted, an arrestment was used by Pitcairn in the hands of Allans & Gow on a debt due by Macintosh, which was afterwards acquired by Haddow. Macintosh, on 30th January 1794, drew a bill on Allans & Gow, in favour of A. Campbell & Co., for L.89, 15s. payable thirty days after sight. This bill was protested for non-acceptance on 12th April, and for non-payment on 15th May,

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[1] 1752, Dunlop *a.* Jap, Fac. Coll. No 5, p. 7. Mor. 741. This case, and that of Creditors of Gordon *v.* Innes, *sup.*, are now held erroneous, and were overruled by the cases of Haddow *v.* Campbell & Co., and Dick *v.* Goodall & Co., *post.*

Whether bills in the hands of a trustee arrestable.

1794, before which time the bill on Drummond & Co. was paid. On the 9th December, 1794, Haddow executed a second arrestment in his own name. He afterwards insisted in a process of furthcoming,[m] which was conjoined with an action of multiplepoinding[n] at the instance of the arrestees. A. Campbell & Co. objected to the validity of the original arrestment by Pitcairn, and maintained, that the draft in their favour, with the protest taken on it, after Allans & Gow had received payment of the bill, must be considered as a completed assignation to the fund *in medio* to the extent of the debt; and as the bill was deposited with Allans & Gow, for the purpose of enabling Macintosh to draw on them in favour of his other creditors, the bill granted to A. Campbell & Co., which was prior in date to the arrestment, was to be considered as an assignation intimated before the former was executed. The Lord Ordinary found the arrestment at Pitcairn's instance, when the arrestee was only in possession of the instruction (voucher) of the debt, was inept; and therefore preferred Campbell & Co. upon the interest pro-

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[m] A process of furthcoming is an action at the instance of the arrester to make his arrestment effectual, by obtaining delivery, or payment, from the arrestee, of the funds and effects attached in his hands.—A.

[n] A process of multiplepoinding is an action raised at the instance of a person, in whose hands the same funds have been attached by different parties, to have the respective rights of the claimants discussed, and a sanction given to him to pay to whoever is found to have the best right.—A.

duced by them. To which judgment the Court adhered.°

There is manifestly, therefore, a considerable discrepancy in the decisions respecting the arrestment of bills. The unreported case of Douglas,

Inconsistency of decisions.

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° 1796, Haddow *a.* Campbell & Co. Fac. Coll. No 6, p. 15. Mor. 763. Mr Bell, Comm. II. 76, states the following as the opinions of the judges in this case. LORD ESKGROVE held, that an arrestment in the hands of Drummond, the accepter of the bill, would have been competent, though defeasible by an onerous indorsation, and professed that he could see no distinction between this case and Thorold's in favour of the arrestment. He held the case to be the same as if a bond or obligation had been lodged with a trustee, and that arrestment could be available only for what was actually received of the sum at the date of its being used. The bill held not to be attachable as a corpus. LORD PRESIDENT CAMPBELL denied the competency of arresting in the hands of the accepter by a creditor of Macintosh. It was placed with the arrestee for a special purpose. The case of Thorold, as his Lordship stated it, seemed to be a little doubtful, for which he mentioned a note of Lord President Dundas, which seemed to say, that the judgment as reported was altered. This, however, was stated by Mr George Home (clerk of Court, a person of most remarkable correctness), to be a mistake. But his Lordship added, that this case did not depend on that precedent. If arrestment be competent at all, the present form is effectual. The *jus exigendi* was in the truster, and, in late cases, the arrestment of the obligation to account was found competent, arrestment being the proper diligence for attaching all personal obligations not the subject of adjudication. See case in Kilk. p. 39, and M'Leod's case in 1779. But he placed his difficulty on the ground of special appropriation. LORD JUSTICE CLERK M'QUEEN,—In Thorold's case, the subjects were chiefly accepted bills. The Court of opinion, that arrestments were good, and that the commission of bankruptcy had no effect in Scotland. In every trust there is a personal *jus crediti*, which is arrestable. But here the trustee had nothing in his hands; vouchers of debt are not subjects of arrestment. LORD ESKGROVE,—The person who remitted the bills did not specify the creditors to whom the contents should be paid, and so no special appropriation. PRESIDENT agreed as to this.

Whether bills in the hands of a trustee arrestable.

Heron, & Co. *a.* Malcolm, militates against that of Jamieson *a.* Leckie; and the decision in the Creditors of Gordon *a.* Innes is encountered by those in Thorold & Co. *a.* Forrest & Sinclair, and Haddow *a.* Campbell & Co. From these last cases it must be inferred, that arrestment of a bill in the hands of a payee or third party, is ineffectual until the money be paid, and will not exclude the claims and diligence of other creditors. At the same time, it may be deduced from the other decisions, that, by the arrestment of a bill, deposited with a third party for behoof of the proprietor, a sufficient *nexus* is imposed as to render it unsafe for the arrestee to part with it, until the claims of the arrester be discussed.[p] Were the author disposed to hazard an opinion on the subject, he would be inclined to think,

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[p] This is not the case; and it is now held to be fixed, that when bills are payable, or indorsed, to an agent or trustee, arrestment in his hands for a debt of the constituent, is altogether inept, unless the trustee has actually received payment. Bell's Comm. II. 76. Dick *v.* Goodall & Co., 1st June 1815, Fac. Coll. Dick, a creditor of Anderson, arrested in the hands of Goodall & Co. certain bills indorsed to them by Anderson, and brought a furthcoming. *Per curiam,*—"This point is quite settled. In the case of Roberts, and afterwards in the case of Haddow, the Court proceeded on the general principle, that it is impossible to arrest bills in the hands of the indorsee. Dick ought to have raised an action of exhibition." Found that the bills had not been habilely attached.

It is not easy to say what mode of attaching bills in these circumstances ought to be adopted; indeed none can be depended on, till it shall have received the sanction of the Court. Mr Bell recommends an action of exhibition against the custodier of the bill, with an arrestment against the debtor (accepter). Comm. *ib.*

with Mr Bell, that there is no obvious reason why a bill may not be attached by an arrestment, so as to secure a preference against all but *onerous* indorsees.

Whether bills due to debtor himself arrestable.

It is well ascertained, however, that a bill due to the debtor himself, can neither be effectually arrested in his own hands, nor in those of the accepter; and that indorsation will defeat the diligence.[q]

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[q] In the case of Smith *a.* Home, 1712, Dalrymple, No 93, p. 130, Mor. 1502, it was offered to be proved, that an arrestment in the hands of the payee was prior to the indorsement by him; but this was refused, and the indorsation sustained, in respect it was not alleged that it was gratuitous, or that the arrestment was known to the indorser.—See Forbes *a.* Innes, 1739, Home, No 113, p. 182. Mor. 712.—MacCoull *a.* Logan, Dict. v. i. p. 105. Mor. 1694.—Neilson *a.* Russell, Dict. vol. ii. p. 218. Mor. 1508 and 1685.—And Sinclair *a.* Lochhead, 1798, Fac. Coll. No 88, p. 208. Mor. App. to Bankrupt, No 9.—A.

It was held in Forbes *v.* Innes, *sup.* and in More *v.* Paxton, 9th December 1766. Mor. 12,259, in questions as to promissory-notes, that an arrester should be preferred to an indorsee, unless the latter could prove that the indorsation was prior to the arrestment. But it is now held, both as to bills and promissory-notes, that an arrestment does not affect the right of an onerous indorsee, even though he was aware of its existence. Bell's Comm. ii. 76.

Mr Bell is farther of opinion, that arrestment by itself is an incompetent diligence for attaching a debt due by bill, in any circumstances. None of the cases, however, have hitherto sanctioned this opinion, and there seems nothing inconsistent in holding, that while a bill remains with the original creditor unindorsed, an arrestment in the accepter's hands for a debt of the holder, may be valid, so far as to bar the accepter from making payment to him, and to afford the arrester a preference in a competition with other creditors. As the privileges bestowed upon indorsees, on account of the convenience of commerce, are the only ground on which debts due by bill have been exempted from arrestment, by which other moveable debts are affectable, —when these privileges are not concerned, the ordinary rules should be applied; in the same manner, as we have already

How long bills retain their privileges.

IV. *For what period bills retain their extraordinary privileges.*—Before the year 1772, it had not been ascertained how long the privileges of bills endured, so as to entitle the holder to an action upon them against the debtor, or what lapse of time or silence, on the part of the holder, was to be construed into a loss of his right, sufficient to debar him from pursuing. There was, accordingly, a variety of decisions on the point.[r] But to obviate the inconveniences which had been found to result from the not limiting bills and promissory-notes to a moderate endurance, it was enacted by 12. George III. c. 72, that action and diligence on bills and notes should be circumscribed to six years after the terms at

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seen, that though no plea of compensation, or qualification of any kind not appearing on the bill itself, can be stated against an indorsee, yet when the bill remains with the original parties, all such defences are quite available to the accepter.

The mode of attaching a bill effectually, so as to prevent the creditor's diligence from being defeated even by an indorsation, is (as recommended by Mr Bell) by arrestment in the accepter's hands, and application to a competent court, to take the bill into its own custody. See Sir H. Dalrymple *v.* Ross, 18th Nov. 1737. Mor. 4819. Bell's Comm. *ib.* As the preference would in this case still depend upon the arrestment, (the sequestration of the bill being merely a precautionary measure, to prevent an indorsation), this affords an argument in favour of what is stated above, that when no indorsation has in fact been made, an arrestment ought to be held a valid attachment of the debt.

[r] See 1766, Wemyss *a.* MacNaughton, Fac. Coll. No 37. p. 62. Mor. 1644—1767, Maxwell *a.* Maxwell, *ibid.* No 52. p. 92. Mor. 1645.—1767, Colquhoun *a.* Duke of Argyle, *ibid.* No 53, p. 93. Mor. 1646—1768, Ker *a.* Ker, *ibid.* No 77, p. 323. Mor. 1648.

which such bills or notes became exigible. And bills now retain their extraordinary privileges during that period.[s]

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[s] 1787, Robertson *a.* MacGlashan, Dict. v. iii. p. 91. Mor. 11,129. See *sup.* p. 148, note [k].

# CHAP. X.

## OF THE ACTION AND DILIGENCE ON BILLS.

Speedy execution on bills.

THE general adoption of bills, in all mercantile and money transactions, has proceeded not only from their being susceptible of a rapid circulation by means of indorsement, and from their affording a greater security to the holder, by being exempted from the exceptions pleadable against other writs, but from their possessing, at the same time, all the privileges of bonds, in the ease and expedition with which the debt may be recovered from the debtor, without the formality and delay of an action at law. On common debts, diligence against the person or estate of the debtor can only proceed in consequence of the judgment of a court. But in bonds, or other deeds for the payment of money, a clause is generally introduced, by which the parties dispense with the necessity of an action, and consent that the deed shall be recorded in the books of a court having a competent jurisdiction, and that execution may pass summarily thereupon. In the event

Decree of registration.

of the debtor refusing or delaying to pay, the possessor of the deed has only to give it to the clerk of court, who enters it among the records, and delivers an extract or authentic copy of it, accompanied with a decree, upon which the debtor may be summarily charged. No clause of registration could possibly enter into bills, that being incompatible with their nature; but the privilege of summary execution was conferred on them by act 1681, 20th of 3d Parliament of Charles II., which is as follows:—"Our Sovereign Lord, considering how necessary it is for the flourishing of trade, that bills or letters of exchange be duly paid, and have ready execution, conform to the custom of other parts, doth therefore, with advice and consent of his estates of parliament, statute and ordain, That in case of any foreign bill of exchange from or to this realm, duly protested for not-acceptance or for not-payment, the said protest, having the bill of exchange prefixed, shall be registrable within six months after the date of the said bill in case of non-acceptance, or after the falling due thereof in case of non-payment, in the books of Council and Session, or other competent judicatures, at the instance of the person to whom the same is made payable, or his order, either against the drawer or indorser, in case of a protest for not-acceptance, or against the accepter, in case of a protest for not-payment, to the effect it may have the authority of the judges thereof interposed thereto, that letters of horning, upon a simple charge of

Act 1681, ch. 3.

six days, and other executorials necessary, may pass thereupon for the whole sums contained in the bill, as well exchange as principal, in form as effeirs; sicklike, and in the same manner as upon registrate bonds or decrees of registration proceeding upon consent of parties: Providing always, that, if the saids protests be not duly registrate within six months, in manner above provided, then, and in that case, the saids bills and protests are not to have summar execution, but only to be pursued by way of ordinary action as accords. And further, it is hereby statute and enacted, that the sums contained in all bills of exchange bear annual rent, in case of not-acceptance from the date thereof, or in case of acceptance and not-payment, from the day of their falling due, ay and while the payment thereof. And further, his Majesty, with advice foresaid, hereby declares, that notwithstanding of the foresaid summar execution provided to follow upon bills of exchange for the sums therein contained, in manner above specified, yet it shall be leasom to the party charger to pursue for the exchange if not contained in the saids bills, with re-exchange, damage, interest, and all expenses, before the ordinary judge; or, in case of suspension, to eik the same to the charge, at the discussing of the said suspension, to the effect that the same may be liquidated, and decree given therefor, either against the party principal, or against him and his cautioners, as accords."

Act 1696, ch. 36.

This statute is made applicable to inland bills

by act 1696, c. 36, which statutes, enacts, and declares, "That the same execution shall be competent and proceed upon inland bills or precepts, as is provided to pass upon foreign bills of exchange by the twentieth act of the third parliament of King Charles the Second, holden *in anno* 1681, which act is hereby extended to inland bills and precepts in all points."

Summary diligence on bills.

The protest of an accepted bill, therefore, may at once be recorded in the books of Council and Session, or in those of any other court within the jurisdiction of which the debtor lives, and a decree is immediately issued, upon which a charge of payment of six days is given, at the expiry of which, if payment be not made, diligence may proceed on the same warrant to secure his property or person. In the case of non-acceptance, execution may pass at the suit of the holder, against the drawer or indorsers.[a] This summary recourse against the drawer and indorsers, even before the term of payment, if the drawee refuses to accept, seems to have been given, because the creditor in a bill frequently consents to a distant term of payment, in consideration of the additional security he is to acquire by the acceptance and responsibility of the drawee; and

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[a] 1795, Cowan *a.* Kay. Dict. v. iii. p. 84. Mor. 1621. In this case, the day of payment of the bill was not till 11th June; but acceptance having been refused, a charge of horning was given by an indorser to the drawer on 23d May. "The Lords were clearly of opinion, that the charge was authorised by the statutes 1681 and 1772."

when disappointed in this respect, it would be hard were he obliged to wait the long term of payment to which he consented, merely in the view of obtaining that security.[b] But after the bill was accepted, the statute 1681 authorised no summary diligence against any other than the accepter; and in the event of his failure, the holder could only proceed by way of ordinary action against the drawer and indorsers. To remedy this, it is enacted, by 12. George III. c. 72, § 42, "That from and after the 15th day of May, 1772, summary execution, by horning or other diligence, shall pass upon bills, whether foreign or inland, and whether accepted, or protested for non-acceptance, and upon all promissory-notes duly negotiated, not only against the accepters of such bills, or granters of such notes, but also against the drawers of such bills, and the whole indorsers of the said bills and notes, jointly and severally, except where the indorsation is qualified to be without recourse, saving and reserving to the drawers or indorsers their respective claims of recourse against each other, and all defences against the same, according to law."

extended against drawers and indorsers.

Sums recoverable by holder.

It is only the principal sum in the bill, with the interest, that can be charged for summarily. The exchange, when it is not included in the bill, the re-exchange incurred by suffering the bill to be protested and returned, and the expense of diligence, must be recovered by an or-

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[b] Ersk. 3. 2. 36.

dinary action; because these not being liquid debts, must be previously constituted by the sentence of a judge, that the amount may be legally ascertained;[c] but, in a suspension, they may be eiked or added to the charge, and decerned for at the discussion of the suspension. Exchange and interest are always due for non-payment. Re-exchange is due if the holder is obliged to raise money by re-drawing bills in the place of the first draft, for which he pays a higher exchange.[d] Damage, which is likewise only due when incurred, is the commission-money paid for procuring the new bill, expense of protesting the old, and postages. But re-exchange is by no means double exchange; it is only the difference between the exchange paid for the first bill and

Exchange, re-exchange, &c.

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[c] Forbes, p. 197.

[d] Sav. tom. i. liv. 3. ch. 11.—Poth. n. 64. Re-exchange and damages on a dishonoured bill from Jamaica are 8 *per cent.*, besides all expenses; on a bill from the Leeward Islands 10 *per cent.*; and from Demerara and Berbice 25 *per cent.* Re-exchange from London is $1\frac{1}{4}$ *per cent.*, and $\frac{1}{2}$ *per cent.* commission, besides other charges.—A.

It is understood that the re-exchange from London is now considerably less, since the late alteration in the period of drawing between Scotland and London, but the charge is not uniform.

In Auriol *v.* Thomas, 2 T. R. 52, where a claim was made on a bill for 800 star pagodas, it appeared that it was the usage to charge 10s. per pagoda for bills returned from India protested, and 5 per cent. after the expiration of thirty days from the notice to the defendant of the bill's dishonour, which included all incidental charges. The jury found a verdict to the above amount for the plaintiff, though he had discounted the bill at the rate of 6s. 6d. the pagoda, that being then the current price, and on an objection that this allowance was exorbitant, and the agreement for it usurious, the Court supported the verdict.

that paid for the second.[e] The holder cannot claim damage sustained on account of his being

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Exchange and re-exchange.

[e] Forbes, p. 198.—Poth. n. 64.—Ord. de Com. tit. 6. art. 7. *Exchange* is the difference between the value of money at the place where a bill is drawn and where it is payable, see *sup.* p. 9, *et seq.* This term is commonly used to denote the premium, which is paid for a draft by the purchaser or payee to the drawer.

*Re-exchange* is, properly, the exchange which is or may be paid, upon a re-draft on the drawer, by the holder of a bill which has been dishonoured, in order to raise the amount of the dishonoured bill on the day, and in the place of payment; and it thus depends upon the rate of the exchange between the place of drawing and the place of payment. Chitty, 424. De Tastet *v.* Baring, 11 East, 269-70. Pothier, No 64-5. It is obvious, that unless the drawer were obliged, when the bill is returned on him at the place where it was drawn, to pay re-exchange, which marks the amount of the difference between the value of the money when paid there, and when paid at the place of payment, the bill holder would not receive an equivalent for the sum he has been disappointed of, by reason of the non-payment of the bill. But the holder cannot charge against the drawer both the exchange paid originally, and the re-exchange on the return. This would be to give him a sum equivalent to the net amount of the former bill in its place of payment; whereas his actual damage amounts only to that sum, *minus* the exchange he originally paid; and he can justly claim nothing more than he would have been entitled to, had the bill been paid when due. On this ground, a passage in Mr Bell's Comm. I. 317, seems inaccurate. He states, that "the bill or re-draft is composed of the sum in the former bill, the commission or *exchange*, the foreign interest from the term of payment to the term of payment of the new bill, the costs of protest, correspondence, stamps, &c. and the *exchange* on the return."

The definition of re-exchange in the text, supposes that a claim is made against the drawer for the exchange originally paid, and, as a further damage, for the excess only of the exchange on the re-draft; but this is not done in practice, no distinct charge of exchange being ever made, agreeably to the rule in England, where a claim of re-exchange only is allowed. Chitty, 423. Bayley, 282. The examples of re-exchange given in note [d], do not appear to be properly such, but re-exchange, mixed up with a sum of conventional *damage*, supposed to be incurred on account of the return of the bill dishonoured. In all cases of inland exchange in Great Britain, the re-exchange demanded on the dishonour of a bill, it is understood, is of this description.

When a bill has passed through the hands of various indorsers in

disappointed in his projects through not-payment, or the loss of some favourable opportunity

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different places, it is usually returned back to the drawer through the indorsers. Each indorser is, in these circumstances, liable in re-exchange, according to the course of exchange between his place of residence and the place of payment only. Forbes, 200.

Exchange and re-exchange.

It is thought to be a doubtful point, whether the accepter of a dishonoured bill is liable in re-exchange. Pothier, No 117, considers that he is; and Mr Bell, I. 316, is also of that opinion. He says, "It has been questioned, whether the accepter's estate is liable to a claim for re-exchange? That this accumulation of expense falls legitimately on the drawer is unquestionable. But it admits of a different consideration, whether the accepter is liable. It is not a demand which naturally arises against the accepter by the *porteur*, for his proper recourse is against the drawer; but as the drawer will, on answering that demand, have his claim against the accepter, provided he have funds in his hands, for indemnification, it does not appear that any bar would lie to a claim by the *porteur* against the accepter's estate, in the case of the drawer becoming bankrupt; for it seems to be implied in the nature of the accepter's engagement to this peculiar sort of instrument, that he is tacitly bound for the common mercantile damage arising from its dishonour." See also Francis *v.* Rucker and others, 1768, Ambler, 672. In this case an English merchant had commissioned a large quantity of corn from Pennsylvania, and had directed his correspondent to draw bills on him for payment of the price. By a law of that settlement, the drawer and indorsers of bills drawn in Pennsylvania, on any person in Europe, and returned protested for non-payment, were declared to be liable in 20 per cent. advance for the damage thereof, which was said to be in lieu of re-exchange, on account of there being no course of exchange from England on Pennsylvania. On the bankruptcy of the accepter in England, the 20 per cent. was allowed to be proved against his estate by the drawer, who had been obliged to pay it on the returned bills." Bayley also, 358, note (41), says, "It seems reasonable that the accepter should be liable in re-exchange to all parties, where he has effects, and to all excepting the drawer, where he has not."

On the other hand, it is fixed, in the modern practice of the English Courts, that an accepter is not liable for re-exchange. Chitty, 424-5. Bayley, 283. Woolsey *v.* De Crawford, 2 Camp. 445. Action on a bill drawn at Quebec, and accepted in England, returned from England on payee dishonoured, who had paid the indorsee L.10 per cent. as re-exchange, and L.6 of interest, since the bill became due, besides other charges. Action against accepter. *Lord Ellenborough,*—"You may as well state, that by reason

of making profit by the money.[f] And, according to the French ordonnance of 1673, re-ex-

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Exchange and re-exchange.

of the bill not being paid, the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer. He undertakes that the bill shall be paid, or that he will indemnify the holder against the consequences; the accepter's contract cannot be carried further than to pay the sum specified in the bill, and interest according to the legal rate, where it is due." Verdict accordingly.—Napier *v.* Schneider, 12 East, 420. Bill drawn in Scotland, accepted by defendant in England, but not paid; and on question whether re-exchange? Court clearly of opinion, that this could not be allowed against an accepter here, who, by his acceptance, only charges himself with a liability to pay according to the law of this country, and, if he do not pay, the holder has his remedy over against the drawer. The Court would not, they said, refer it to the Master to try foreign customs and facts, but only to compute what was due upon the bill itself.

This question, on which the authorities are so contradictory, is of considerable difficulty, owing to the various meanings which are applied to the term re-exchange. As to the liability of the accepter for *proper* re-exchange, the following considerations occur to the editor in support of the rule adopted in England:—1st, The drawer and indorsers, on selling the bill, received from the indorsee the *exchange*, as well as the principal sum. When obliged to pay re-exchange, therefore, they are only refunding what they have already received; and though the exchange may, no doubt, have become more unfavourable by the term of payment than it was when they indorsed the bill, and so they may have to pay a greater sum than they received, yet it may have become less unfavourable, in which case they would be gainers. This expense thus arises altogether out of the circumstance, that the drawer, for his own convenience, recovered his debt by means of a bill of exchange, on the negotiation of which he may, owing to the accidental fluctuations of the exchange, be a gainer or loser; but with the profit or loss on this transaction the accepter has no concern. But, 2dly, the holder or drawer, on recovering the amount of the bill from the accepter in the place of payment, truly receives an equivalent for the re-exchange. That charge, as has been seen,

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Scarlett, c. 21. R. 10. Poth. n. 63. Forbes, p. 197. "Si mercator probat, si debitam pecuniam persolvisset dicta die, certe lucratus esset decem, audiatur; verum si dicat ex illis pecuniis merces comparasset lucratusque esset, non audiatur,"—according to Straccha, quoted by the last. Chitty, 426.

change cannot be demanded, unless it be shewn by an instrument, that the holder of the pro-

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occurs only when money is more valuable at the place of payment than at the place of drawing, and it marks the difference of value of the two currencies. See Pothier, No 64; also De Tastet *v.* Baring, *sup.*, and Hoffman, *ex parte,* 10th Dec. 1799, Cooke's Bankrupt Law, 185. When the accepter pays up the debt in the more valuable currency at the place of payment, it is evident that the re-exchange is included in the sum which he pays. This is acknowledged in what has been already noticed, that each indorser is liable in re-exchange according to the course of exchange between his place of residence and the place of payment only, because the exchange for this lesser distance, along with the principal sum, is equivalent to the amount of the bill in the place of payment. Of course, had one of the indorsers lived in the place of payment, no re-exchange at all could have been exacted from him; and the accepter must be in the like situation. Thus, if a merchant in Inverness should allow a bill which he had accepted, payable at Edinburgh, to be protested, but should afterwards, while it still remains in the holder's hands in Edinburgh, cause payment of it to be made there, he ought not to be held liable in re-exchange, because the bill has been satisfied in the currency in which it was payable. But should payment be recovered from the accepter at a place different from that where the bill ought to have been paid, the exchange between these places, if unfavourable to the former, ought to be paid by him, on the same principle that the *drawer* is liable in re-exchange, when called on to pay the bill in the place of drawing; otherwise the holder will not receive an equivalent for the sum in the dishonoured bill. Thus, in the case already mentioned, should the contents of the bill be recovered from the Inverness merchant in that town, he ought, it is thought, in addition, to be liable for the re-exchange between it and Edinburgh, where the bill ought to have been paid.

These observations apply only to the charge of re-exchange, properly so called, and not to the charge on account of actual damage, or to the expense of protest, postages, commission, and the like, which are usually incurred on the dishonour of a bill. These expenses, as having been caused directly by the accepter's breach of engagement, ought to be borne by him; and it appears that he is held responsible to this extent in England. Chitty, 419, *et seq.* Bayley, 278, 358. The case of Francis *v.* Rucker, *sup.*, quoted in Brown's Chancery Cases, II. 599, and referred to by Mr Bell, Comm. *ib.*, as establishing

Circuitous re-exchange.

tested bill took up money by exchange at the place where it should have been paid.[g] When a bill, too, has been transmitted by indorsation, and negotiated in different places, the drawer is only liable for re-exchange to the place from whence the remittance was made; and the holder must operate his relief against the indorsers, and the indorsers against each other, for payment of the re-exchange between the places where it was negotiated by them.[h] But if, by the drawer's order or permission, the bill was transmitted through different places, or if he gave indefinite powers to negotiate, he will be liable for re-exchange to these places.[i] In England, the drawer of a bill was found liable for the whole amount of the re-exchange, occasioned by the circuitous mode of returning the bill through the various countries in which it had been negotiated, as

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that the drawer may recur on the accepter for re-exchange, appears accordingly to have been decided on the ground, that the 20 per cent. was a sum of conventional *damage,* to which the parties subjected themselves in case of a return of the bill. But where, as in that case, the proper re-exchange is not separated from the claim on account of damage, it may be difficult to lay down any just rule on this subject; and if the point should occur in Scotland, the safest ground of decision would perhaps be, the understanding and practice of merchants.

[g] Sav. tom. i. liv. iii. ch. 11. Ord. tit. 6. art. 7. This continues to be required by the new code, l. i. t. 8. § 177, 186. The holder is not, however, in this country, under the necessity of shewing this; all that he is required to prove is, that a course of exchange, direct or circuitous, actually exists at the time between the place of drawing and the place of payment. Chitty, 424, 5. Bayley, 284.

[h] Boucher, n. 1062. Sav. tom. i. ch. 11. Poth. n. 67.

[i] Ord. de Com. art. 6. tit. 6. Sav. *ibid.* p. 206.

much as for that occasioned by a direct return, although payment of the bill was expressly prohibited by the laws of the country on which it was drawn.[k] The principle seems to be, that the drawer is in all cases liable for the damage and expense occasioned by the dishonour of the bill, as he ought not to have drawn it, if he were not sure of its being accepted and retired. At any rate, he is bound to indemnify the payee, from whom he received value, of all loss to which the former may have been subjected by the refusal and return of the bill. But where that loss has been occasioned by a fortuitous event, such as occurred in the English case just cited, there certainly is a degree of hardship in making the drawer responsible for an extraordinary expense, which he could neither foresee nor prevent. At the same time, there is a difficulty, and perhaps an equal or greater hardship, in fixing it on any of the other parties, unless the bill has, for some particular purpose, been negotiated by them out of the usual and ordinary channel; in which case the drawer ought only to be liable for what would have been the re-exchange on a direct return of the bill, and the indorsers liable to each other for the difference.[l]

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[k] Chitty, 106, 424. Kyd, 140, 141.

[l] Mr Bell, Comm. I. 318, considers the author's doubt as to the drawer being liable for circuitous re-exchange, to be without foundation. He says, "It has been contended, against such responsibility, that the intermediate negotiation is a fortuitous event, which he (the drawer) could neither foresee nor prevent. But this cannot correctly be said of a mercantile document, in-

Interest.

By the act 1681, bills are declared to bear interest by law from their date, if not accepted; and from the term of payment, if accepted and not paid. The payee is supposed to have given value to the drawer at the time the bill was drawn; and, therefore, if it be not accepted, he is entitled to interest from its date. But where it is accepted, and not paid, he can only claim interest from the period of payment to which he consented, in case acceptance was obtained. Hence the distinction of the act. As, by this statute, a protest is necessary for procuring diligence, it might be inferred that it is also necessary to give a right to interest. In the case of non-acceptance, a protest is required, to ascertain that the bill was presented and refused; and, for the same reason, a protest for non-payment is requisite, to shew that a demand of payment was made. Properly, therefore, interest should only be due on bills that are strictly negotiated, as the protest is the legal evidence of the demand. This, accordingly, appears to be the law of England,[m]

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tended to circulate by indorsation, and serve the purpose of money. The drawer must be taken to have in contemplation all the loss which may arise in the fair course of negotiation, either before or after acceptance. This remedy, however, must always be under the restraint of equity; and where there appears any manifest breach of equity in the negotiation, redress will be given."

[m] 9. & 10. Will. III. c. 17. § 2.—3. & 4. Anne, c. 9.—Chitty, p. 218.—Kyd, p. 144. It must be confessed, that, in both countries, the law is rather obscure on the subject.—A.

These statutes certainly imply, that without a protest, no interest is recoverable in England on an inland bill of exchange; but the contrary has since been settled, Windle *v.* Andrews, 2 B. & A. 696. Here, in a question whether interest should be

and other countries.[n] However, it has been decided, that a foreign bill of exchange bears interest against the accepter from the term of payment, although not protested for non-payment.[o] And where a bill was drawn, payable to the drawer three days after sight, and no demand made upon it for several years, the Court found interest to be due on the bill after the three days, as, in the circumstances of the case, it was construed to be drawn three days after date.[p] A bill, payable to the drawer at sight, the acceptance of which was not dated, was found to bear interest from the date of the bill.[q] Lord Kil- Interest.

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struck out of the verdict, under 3. & 4. Anne, on the ground of there having been no protest, the Court held the want of a protest no ground for disallowing interest, where notice of the dishonour of the bill had been duly given, and that the object of 9. & 10. Will. III. and 3. & 4. Anne, was to give interest, damages, and costs, in cases in which it was supposed they were not recoverable at common law, not to deprive a plaintiff of them in any case, in which the common law would give them. See also Bayley, 280, and *sup.* p. 188, note [a], and 205, note [h].

[n] In France, interest is only due from the date of the protest. "L'interet du principal et du change sera dû du jour du protêt." Ord. de Com. tit. 6. art. 7.—A.

[o] 1718, Baynton & Shaw, *a.* Swinton, R. Dec. v. i. No 15, p. 30. Mor. 474. "Where a term of payment is adjected, there is no need of a formal demand by protestation, *dies interpellat pro homine.*" Ersk. B. III. t. 3. § 77. Neither is it held necessary in order to recover interest from the accepter, to prove even a demand, in the case of a bill payable at a certain time. Chitty, 420.

When interest is not stipulated in the bill itself, it is held in England to be due only as *damage*, and it is therefore the province of the jury to say, in the whole circumstances, in what cases, and from what time, it should be allowed. Chitty, *ib.* This is not the case in Scotland, where interest is due by statute on all bills, without exception. See *sup.* p. 265-6.

[p] 1740, Tarras *a.* Innes, Home, No 141, p. 241. Mor. 475.

[q] 1748, Kinloch *a.* Mercers, Kilker. (B. of Exch.) No 18, p. 83. Mor. 477.

Interest. kerran remarks, on this case, that it is an usual thing to draw bills payable at sight to a third party, in the same or a distant country; and the sight or acceptance is the term of payment; but it is an improper style, where the bill is drawn payable to the drawer, especially (which probably was the case here) where the parties are together at the time; yet when the bill is so drawn, the words *at sight*, cannot have a different signification from what they have upon other occasions; and, therefore, the acceptance is the term of payment, and there is no need of any other demand.

Bills and promissory-notes, payable on demand, can only bear interest from the date of the protest, if protested; or the date of citation, if an action has been brought upon them.[r] No interest is due on a bill accepted by a wife, though for the price of articles which fall within her *præpositura*,[s] as no married woman can grant securities bearing interest.

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[r] 1751, Moncrieff *a.* Moncrieff, Falconer, v. ii. No 248, p. 303. Mor. 478. In the English case of Cotton *v.* Horsemanden, Pract. Reg. 357, the Court held, that in actions upon promissory-notes, payable on demand, interest should be given from the time of the demand proved; but, in this case, where it appeared on the face of the note to be for money lent, interest should be given from the date of the note.

[s] Forrest *a.* Earl of Sutherland. Mor. 478.

[t] Chap. ii. p. 39. In England, a drawer or indorser is liable for interest, only from the time he receives notice of the dishonour. Chitty, 421. But in Scotland, such a construction of their obligation would not be consistent with the terms of the act 1681. In England, the currency of interest stops at the date of a final judgment in an action brought upon the bill. Chitty, 242. In Scotland, the decree in an action always includes interest of the sum till paid; and when summary diligence is raised on a bill, such diligence authorises the re-

Parties entitled to raise horning.

Horning may be taken out at the instance of the holder against the drawer and all the indorsers at the same time; for, so far as regards the holder, they are all drawers, and it would be very inconvenient were they to be discussed separately, especially in foreign bills, where it might be on the faith of one of the intermediate indorsers only, that the holder had given value for the bill.[u] And although the protest be in the name of an indorsee, the indorser or drawer who has paid, may proceed with summary diligence in his own name;[v] in which case it is usual and necessary to take a receipt upon the bill or protest, to shew that the contents were paid by him in whose name the diligence is to

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covery of interest down to the actual payment. The holder is farther entitled, by act 1621, ch. 20, to demand interest on the accumulated sum of principal and interest, due at the date of the denunciation of the obligants upon letters of horning. But to confer this privilege, the denunciation must have been at the head burgh of the shire of the debtor's residence, and not merely at the market-cross of Edinburgh, though denunciation at the latter place is a valid warrant for letters of caption. Ersk. B. III. t. 3. § 77.

[u] 1747, A. *a.* B. Kilker. (B. of Exch.) No 13, p. 78. Mor. 1510. Poth. n. 160. If a company be obligants upon a bill, a horning directed against the firm is a sufficient warrant for a charge against any individual partner, and such a charge may be given at once, without any previous discussion of the company. Thomson *v.* Liddell & Co. 2d July, 1812, Fac. Coll. See ch. ii. "Of the competent Parties to Bills."

[v] 1745, Herries, Falconer's Dec. v. i. p. 39. Mor. 1509. In this case, the petitioner, who was a drawer of one bill, and an indorser of another, had paid them, upon receipts to him on the protests taken by posterior indorsees. In allowing the protests to be registered in Mr Herries' name, in order to warrant summary diligence at his instance, the Court permitted what has since been established by the clause in 12 George III., quoted in next note.

Parties entitled to raise horning.

proceed. But, according to the act before recited, 12 George III., diligence cannot proceed by horning against the drawer and indorsers, unless the bill be duly negotiated and protested within the three days of grace; for no summary execution is authorised by this act, if a protest has not been regularly taken within these days.[x] If a bill is protested for non-acceptance, it must be registered within six months of the date of the bill, and, if protested for non-payment, the protest and registration must be within six months of the day on which the bill fell due.[y]

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[w] By 12 George III. c. 72. § 43. it is provided, "that from and after the said 15th day of May, 1772, summary execution by horning or other diligence shall be competent to the indorsee of a bill, although the protest is not in the name of the indorsee craving the diligence, and although the bill is not re-conveyed to him by indorsation; if he produces a receipt for the value, by act of honour, or a missive letter from the protesting indorsee, mentioning the dishonour, agreeable to the practice of merchants in returned bills." The receipt must in practice be registered along with the protest, so that if the protest have been registered before the drawer or indorser makes payment, he can proceed against the previous parties, only by taking an assignation of the bill and protest from the party in whose name registration was made, on which, with the registered protest, horning and other summary diligence may be raised.

[x] 1775, Elliot *a.* Richmond, Fac. Coll. No 196, p. 132, Mor. 1602. And therefore, as was found in this case, though the bill may have been an accommodation-bill, and so not requiring strict negotiation, yet as the act 12 George III. gives the privilege of summary diligence against the drawer and indorsers, only in the case of a bill "duly negotiated," it is irregular to raise horning on a bill in this situation, and the charger will be reserved to his action at common law. The same strictness is not observed in practice with regard to an accepter, against whom diligence is frequently raised on a protest, taken at any time within the six months allowed for registrating it.

[y] 1699, Yuille *a.* Richardson, Fountainhall, ii. 64, Mor. 14996.

Parties entitled to raise horning.

The construction of this part of the act in practice is, that the bill and protest must be registered within six months of the precise day of payment, and not within six months of the last day of grace.[z] It was found in 1762, Scougal *a.* Ker, where a bill had lain over twenty months without any diligence done on it, that the privilege of summary execution, and of barring compensation, were upon the same footing, so as that both should be lost together.[a] But the law in this respect is now altered; and though bills cannot be the foundation of summary diligence, unless protested and registered within six months from their date, if not accepted, and from the day they are due, if protested for non-payment, they retain their extraordinary privileges, in other respects, for six years.[b]

Horning incompetent on irregular bill.

Horning cannot proceed on a bill wanting the drawer's subscription; for although the bill, being holograph of the drawer, might be valid without his subscription, yet it would require a proof of its being holograph; and no horning can proceed but upon writs *ex facie* valid.[c] A bill

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[z] This construction is not followed in practice, protests being received and registered within six months after the last day of grace.

[a] Kam. Sel. Dec. 190, 254. Mor. 1407, 1641.

[b] 1787, Robertson *a.* MacGlashan, Mor. 11129. See *sup.* p. 148, note [k].

[c] 1750, A. *a.* B. Dict. v. iii. p. 76. Mor. 1442. Neither can horning be raised on bills which appear to have been erased in any important part, or which are subscribed only by a mark or initials, see *sup.* p. 74; or which have been accepted conditionally, Ersk. b. 2. t. 5. § 54.

being indorsed to a merchant in London, "for value in account," was protested in his name for non-payment, and returned to the indorser, who charged the accepter with horning, and executed a poinding, after receiving advice that the indorsee had died at London, some days before the date of the charge. "The Lords reduced the poinding, though it was pleaded, that in the case of indorsations for value in account, the substantial interest remains in the indorser.[d]

Summary diligence incompetent if protest not registered within six months.

Where an accepted bill has been neglected to be protested and registered within the six months, it can only be pursued for by an ordinary action, like any other voucher of debt. And where a bill has, by any accident, been lost or destroyed, an action for proving its tenor is competent to the owner against the other parties liable, in which he must condescend on a special *casus amissionis*.[e]

Proving the tenor.

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[d] 1766, Stewart *a.* Foggo, Fac. Coll. 48, p. 277. Mor. 8136. The Court, in this case, repelled the plea of retention urged for the poinder, upon the authority of the decisions, 1707, Lees *a.* Dinwoodie, Fountainhall, v. ii. p. 402, Mor. 2546 and 2616, and 1745, Creditors of Glendinning *a.* Montgomery, Kilkerran (Arrestment), No 16, p. 44, Mor. 1449 and 2573. In these cases there was a *bona fides* which did not occur in this case.—A.

These last cases are now held to be erroneous.—Bell's Comm. II. 99.

[e] 1780, Campbell *a.* Creditors of York Buildings Company, Fac. Coll. No 106, p. 200. Mor. 15,828.

The same found in Carson *v.* M'Micking and others, 14th May 1811, Fac. Coll. An action of proving the tenor, is the mode by which the contents of a lost writing are ascertained by decree of the Court of Session. It is a general rule in such actions, that the pursuer must first prove the *casus amissionis*, or the cause of the disappearance of the writing.

The following are the steps necessary for the completion of personal diligence, after the execution of letters of horning:—The six days of charge being expired, the debtor is, by a messenger at arms, denounced a rebel at the market-cross of the head burgh of the shire within which he resides, or at the market-cross of Edinburgh (the fiction of law, with regard to this species of personal execution, being, that the debtor, by disobeying the commands of the Sovereign, is guilty of rebellion, and therefore liable to imprisonment). See Erskine, b. 2, t. 5, § 55-6. Within fifteen days after the denunciation, the horning and executions must be registered in the books of the shire within which the debtor is denounced, or in those of the general register at Edinburgh,—Ersk. *ib.*; and, on an application to the Bill Chamber of the Court of Session, and production of the horning and executions, duly registered, warrant is issued for letters of caption, on which the debtor may be at once apprehended and lodged in prison. Procedure on horning. Caption.

It is to be observed, (and this is applicable to all cases of diligence), that the charge to pay is held to fall, unless followed up within a year of its date, and that, to warrant the issuing of caption after the elapse of that period, the charge must be renewed. Should one of the obligants pay the debt, after horning has been raised by the holder of the bill, he cannot proceed to execute this horning in his own name, because the messenger is not a judge of the validity of the assignation; he must obtain the holder's consent to execute it in his name, or procure a new horning, at his own instance, upon the registered protest and assignation. But should the horning have been executed by the holder, the Court of Session will, on production of the assignation, authorise letters of caption to be issued in name of the assignee.—Bell's Comm. II. 24. After a year charge must be renewed. Diligence by assignee.

Besides the personal diligence by means of horning and caption, a warrant for imprisonment, called an Act of Warding, may be obtained, from the magistrates of a burgh, against such of the obligants on a bill as reside within the burgh. This is procured by registration of the protest in the burgh court-books, and its execution is preceded by the usual charge to pay. Act of warding.

The course of personal execution may be stopped, and the validity of objections to the debt or diligence, on the part of the debtor, discussed, by presentment of a bill of suspension to the Court of Session, for the proceedings in which, reference may be made to Ivory's Form of Process, vol. 1st. Suspension.

In addition to these modes of personal execution for *payment* of a bill, the holder may, whether the bill be due or not, obtain the summary apprehension and imprisonment of any of the obligants, who is preparing fraudulently to abscond from Scotland. This may be authorised by any civil magistrate, to whom the holder must apply by petition, detailing the claim of debt, and the circumstances which induce him to suspect the design of *Med. fugæ* warrant.

the debtor (to both of which he must give his oath of belief). The magistrate, upon this, must call the debtor before him, and, on an inquiry into the whole circumstances, and a consideration of the evidence instantly adduced by both parties, he is bound, if he conceive the creditor's suspicions to be well-founded, to require the debtor to find caution that he will remain in the country till diligence can be executed against him, and, failing his doing so, to commit him to prison. Bell's Comm. I. 295, II. 538, *et seq.* This proceeding is competent against persons in the Sanctuary, so as to secure them there, and against foreigners, unless their being within Scotland is merely casual, and without fraud.—Bell, II. *ib.*

It would be inconsistent with the object of this work, to give a detailed account of the nature and operation of the various kinds of diligence against *property*, of which a bill may be the warrant. At the same time, it will be useful to present a concise view of the remedies of this description, which are accessible to the holder of a bill,—of their effects in competition with each other,—and of the modes of equalizing preferences, which may have been obtained by particular creditors. It is to be observed, with regard to the whole of these diligences, that so long as it is not prescribed, the bill alone, as a liquid voucher of debt, is a sufficient warrant for raising them, even though the protest may not have been registered within the six months allowed for that purpose.

Bill alone a warrant for diligence against property.

Diligences against heritage.

I. The diligences for affecting *heritable* property are,

Inhibition.

1. Inhibition, the effect of which is to afford the user a title to set aside by reduction, so far as his debt is concerned, all conveyances or transferences, whether legal or voluntary, redeemable or irredeemable, of his debtor's heritable property, granted or obtained after the publication of the inhibition. The power of challenge, however, does not apply, when the *cause* of granting or obtaining the conveyance or transference existed *before* the publication. Thus, debts contracted before it, may, notwithstanding the inhibition, be made the ground of attaching the debtor's heritage by adjudication, which, were they contracted after it, would not be the case. This diligence may be obtained upon a bill whether due or not; but in the latter case, the debtor, by application to the Court of Session, will obtain it discharged, on his finding caution for the debt. The letters of inhibition, (which pass under the Signet,) must be executed against the debtor personally, or at his dwelling-house, published at the market-cross of the head burgh of the shire within which he resides, and, with the executions, registered within forty days after the publication, either in the books of the shires where he resides and where his heritable property

lies, or (which answers for both) in the general register at Edinburgh. See Bell's Comm. II. 147, *et seq.* Ersk. b. ii.

2. ADJUDICATION, (authorised by act 1672, ch. 19.) by which a debtor's heritable property is transferred to the creditor in satisfaction of his debt. It is obtained by means of an action before the Court of Session, the summons in which must contain a narrative of the ground of debt, and a description of the debtor's property. The conclusion is alternative; 1*st*, that as much of the heritage as shall be equivalent to the debt, and a fifth part more, on account of the creditor being obliged to take land for his money, with the charges of titles, shall be adjudged over to the creditor, in whose favour possession is to be ceded, and his right ratified by the debtor; 2*d*, failing the acquiescence of the debtor, the summons concludes, that the whole property shall be adjudged over to the creditor, in satisfaction of the principal sum and interest, as accumulated at the date of the decree, the interest of that accumulated sum, and the expenses of titles. Decree is usually obtained as a matter of course according to the last alternative, or *general* adjudication, the debtor never taking advantage of the first, or *special* adjudication. An abbreviate of this decree must be recorded within sixty days after its date. When the subject adjudged is not feudal, the decree is a complete title to it; when feudal, the creditor, in virtue of the decree, may obtain from the superior of the property a charter of adjudication, on which a feudal title by infeftment may be completed. Adjudication.

The debtor is allowed a power of redeeming his lands, in the case of a special adjudication, within five years; and in the case of a general adjudication, within ten. It is necessary for the creditor, however, before the property becomes irredeemably his, to obtain a *decree of declarator of expiry of the legal*, (or term of redemption), without which, the debtor may redeem at any time within forty years after the date of the sasine on a charter of adjudication. Expiry of the legal.

Adjudication may also be obtained on a bill, of which the term of payment has not arrived, when the debtor is verging towards bankruptcy. The adjudication in this case is for the principal, interest, and expenses of titles only, without accumulation, and it subsists merely as a *security*, without the privilege of being ever rendered an irredeemable title.

The preference between adjudgers, and purchasers, or creditors holding voluntary securities, is governed by the registration of their respective infeftments; but an adjudication is held, after citation, to have the effect of an inhibition. Among adjudgers themselves, all adjudications obtained prior to the date of the *first effectual* decree, and within a year after it, are preferred *pari passu*. When the property is not feudal, the decree first in date, and duly recorded, is the first effectual; when Preference of adjudications.

feudal, that is the first effectual, on which infeftment is first obtained; or else, when the property holds of the crown, that on which a signature is first presented in Exchequer, and when of a subject, on which a general charge of horning is first executed against superiors edictally; an abstract of the signature and the charge being registered in the record of abbreviates of adjudications.

For an account of the history and varieties of adjudication, the steps necessary to be taken when it is led against an *heir*, and a complete view of the law regarding the constitution, effects, and preference of adjudications, reference is made to the able and comprehensive details in Bell's Comm. I. 596-647, and II. 13-16., and also to Erskine, b. 2. t. 12.

Ranking and sale.

After a creditor has put himself in possession in virtue of a decree of adjudication, he is entitled, provided the debtor be in a state of insolvency, to bring his whole heritage to sale by public auction, and obtain a division of the price among his creditors, according to their debts and preferences. This is brought about by means of an action of RANKING AND SALE, which is carried on before the Court of Session,—for the nature and proceedings in which, see Bell's Comm. II. 297-333.

Diligence against moveables.

II. The diligences against *moveable* property are,

Poinding.

1. POINDING, by which the *ipsa corpora* of moveables belonging to a debtor are attached, and applied in extinction of the creditor's debt. It is applicable, whether the effects are in the hands of the debtor himself, or of a third party,—in the latter case, subject to any rights such third party may have over them. To warrant the use of this diligence for recovering payment of a bill, the term of payment must have arrived. The modes of obtaining it are various: On registering the protest in the books of any of the inferior judges, to whose jurisdiction the debtor is subject, a precept for poinding is issued, which is effectual within that jurisdiction; a warrant to poind is, by uniform style, contained in letters of horning; and separate letters of poinding under the signet may be procured, on application to the Court of Session. Before poinding can be put in force, a charge of six days must, in the case of a bill, be given, and have expired. The mode of executing it, and of bringing the effects to sale, is now regulated by the present bankrupt statute, § 4. The messenger, or officer, who executes the poinding, first causes the effects to be valued by sworn appraisers, and offers them back to the debtor at the valuation. On refusal, he attaches them for behoof of the creditor, and reports the proceedings to the Sheriff, who grants warrant for selling the effects after due public notice, the sale being not less than eight free days, nor more than twenty, from the date of the order. A note of the sale, and of the sums arising from it, must, within eight days, be lodged with the

Sheriff-clerk, on which the Sheriff ordains the proceeds to be paid to the creditor. Should no purchaser appear, the goods are delivered over to the creditor at the appraised values. See Bell's Comm. II. 66-70.

Arrestment.

2. ARRESTMENT, which may be used on a bill, whether due or not. The modes of raising this diligence are the same as in the case of poinding. Its effect is, to attach debts and effects indebted by a third person to the debtor of the creditor using it. When obtained on a bill not due, the debtor may get his property released from the arrestment, by finding caution to the amount of the sum or effects arrested. This diligence is made effectual by an *action of furthcoming* against the arrestee, to which the owner of the property arrested (or common debtor) is also called as a party. In this action, which, in the case of a bill not due, cannot be raised till after the term of payment, the amount of the debt due by the arrestee is ascertained, or the effects in his hands converted into money, and warrant is granted for payment to the arrester. See Bell's Comm. II. 70-81.

Confirmation as executor-creditor.

3. If an obligant on a bill be dead, the holder must proceed by action against his executors, if they have confirmed or intromitted with his estate, or by attaching the deceased's moveable property by means of CONFIRMATION as *executor-creditor*. The forms necessary for this purpose, which are somewhat intricate, and vary according to circumstances, together with the rules for effecting an equal distribution of a deceased person's property among his creditors, will be found in Bell's Comm. II. 86-96.

Criterion of preference.

The dates, according to the priority of which the preferences of the above diligences against moveables are governed in competition with each other, are, the date of the messenger's execution of poinding, the date of the decree of furthcoming, and the date of the decree of confirmation as executor-creditor; and in competition with voluntary transferences or conveyances,—the dates of the execution of poinding and decree of confirmation, and the date of the arrestment, compared with that of the completion of the transference by intimation or delivery. Arrestments, in competition with each other, as well as with voluntary conveyances, are preferred according to their own dates.

Mode of equalizing preferences.

*1st*, By rendering debtor bankrupt.

Preferences obtained by individual creditors over their debtor's property may be set aside, by rendering the debtor bankrupt under act 1696, ch. 5., and 54. Geo. III., ch. 137. § 1. Under these acts, a person is made bankrupt, who, being under diligence by horning and caption at the instance of his creditor, is either imprisoned, or retires to the Abbey, or any other privileged place, or flees or absconds for his personal security, or de-

fends his person by force ;—or who, being out of Scotland, or not liable to be imprisoned, by being in the sanctuary, or by reason of privilege or personal protection, receives a charge of horning, attended with either an execution of arrestment of any of his effects, not loosed or discharged within fifteen days after the date thereof, or an execution of poinding of any of his moveables, or a decree of adjudication of any part of his heritable estate, for payment or security of debt ;—and any of these situations being joined with insolvency. By the first of these acts, all voluntary securities obtained by creditors for prior debts, within sixty days previous to bankruptcy, are annulled, as to which see ch. XII. By the last, it is declared, § 2, that all *arrestments* used within sixty days prior to bankruptcy, or within four calendar months after it, shall be ranked *pari passu*, reserving a preference for the expense of the furthcoming, where it has been raised ; and, § 5, that every creditor, having liquidated grounds of debt, or decrees for payment, may obtain a *pari passu* preference with any creditor who has executed a *poinding* within the above periods, by summoning him, or judicially producing the decrees or grounds of debt in any process or competition, relative to the goods or price thereof, before the expiry of the four months, reserving to the poinder a preference for the expense of his diligence. All arrestments and poindings prior to the sixty days, and posterior to the four months, are to be ranked according to the ordinary rules. The holder of a bill can have no difficulty in availing himself of these provisions. See Bell's Comm. II. 81-6.

*2d*, By sequestration.

Preferences over a bankrupt's property may also be destroyed, provided he is a trader, or falls within one of the other characters specified in the present bankrupt act, 54 Geo III. *sup.* by obtaining a SEQUESTRATION of his effects. If he have been rendered bankrupt, sequestration will be awarded against him, on application to the Court of Session by any one creditor whose debt amounts to L.100 or upwards, any two whose debts amount to L.150 or upwards, or any three or more whose debts amount to L.200 or upwards. If not bankrupt, the debtor must himself concur with the creditors in the application. After the first deliverance on the petition for sequestration, it is incompetent for any creditor to proceed with diligence against the bankrupt's property ; and it is declared by § 22, 30, that the sequestration shall operate as of the above date, both as an inhibition and adjudication as to the heritable estate, and as a complete attachment and transfer of the moveable or personal estate, for behoof of all the creditors. According to the spirit of the act, sequestration ought, when awarded within four months after bankruptcy, to put the whole creditors on a footing with arresters and poinders after the bankruptcy, and within sixty days prior to it. From the terms, however, of § 40, it has been decided, that arrestments and poindings within sixty days prior to the *sequestra-*

*tion* only, are equalized. Bell's Comm. II. 84. Sequestration places the whole funds of the bankrupt in the hands of a trustee elected by the creditors, in order to be realized; and the proceedings are closed, either by a division of the funds among the creditors, in proportion to their debts, or by their acceptance of a composition from the bankrupt. See the subject of sequestration stated at full length in Bell's Comm. II. 342-514.

# CHAP. XI.

## OF THE PRESCRIPTION OF BILLS.

Former state of the law.

MANY disputes and difficulties were found to result from there being no limited period, within which actions upon bills should be brought, and no ascertained space during which they should retain their force and efficacy as privileged documents.[a] It was, therefore, by the 12th Geo. III. c. 72. (rendered perpetual by 23d Geo. III. c. 18, § 55.) enacted, § 37, "That no bill of exchange, or inland bill, or promissory-note, executed after

Act 12. Geo. III. c. 72.

[a] The evils of the former state of the law are apparent from the cases which occurred prior to the act 12. Geo III. When actions founding on bills of an old date were brought, which was frequently after the death of the accepters, it appears that the Court had to draw the best conclusions they could, from the uncertain inferences and presumptions which occurred in each case. In the following instances, action was sustained against the accepter or his heirs. Farquhar *v.* Crawford, 1751, Mor. 1635, in which a bill and promissory-note had lain over seventeen years, and the granter was dead. Hamilton *v.* Hamilton, 1757, *ib.* 1636, where a bill had lain over twenty-one years. Fraser *v.* Cameron, 1759, *ib.* 1638, twenty years, and accepter dead. Stewart *v.* Houston's trustees, 1760, *ib.* twenty-seven years, and accepter dead. Maxwell *v.* Maxwell, 1767, *ib.* 1645, thirty-one years, and accepter dead. See other cases of this description in Morison's Dictionary, T. *Bills of Exchange*, Div. v.

the 15th day of May, 1772, shall be of force, or effectual to produce any diligence or action, in that part of Great Britain called Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said bills or notes became exigible." The same statute enacts, § 38, "That no bill of exchange, or inland bill, or promissory-note, which has been or shall be granted, before the said 15th day of May, 1772, shall be of force, or effectual to produce any diligence or action, unless such diligence has been or shall be raised, or action has or shall be commenced thereon, before the expiration of six years from and after the said 15th day of May, 1772."

Exception of bank-notes.

And by § 39, it is provided, "That no notes, commonly called bank-notes, or post-bills, issued or to be issued by any bank or banking company, and which contain an obligation of payment to the bearer, and are circulated as money, shall be comprehended under the aforesaid limitation or prescription; and that it shall and may be lawful and competent, at any time after the expiration of the said six years, in either of the cases before mentioned, to prove the debts contained in the said bills and promissory-notes, and that the same are resting owing, by the oath or writ of the debtor."

*Debt* may be proved after six years.

From what date prescription runs.

As the action or diligence upon bills and notes, must be raised within six years after the terms, at which the sums therein contained become exi-

gible, it has been decided, that the sexennial prescription runs, not from the precise day of payment, but from the last day of grace, as the contents of a bill or note are not exigible till then;[b] and where a bill was dated prior to the 15th May, 1772, but not payable till after that day, it was found sufficient that action was commenced within six years from the term of payment, as the case had not been provided for by the statute.[c]

Prescription barred by action or diligence,

To interrupt and preclude prescription, summary diligence in the form pointed out in the preceding chapter, must be executed against the parties to the bill; or, where that is omitted to be done within the time required by the statutes, an ordinary action, founding on the bill as a document of debt, must be brought within the six years, in terms of the act above recited. By either of these modes, the debt may be constituted against the debtor, so as to bar the limitation, and entitle the creditor to recover at any time within forty years, the period of the long prescription. The diligence necessary for this purpose must be complete, and the action regular and formal. The mere act of protesting the bill, or even registering the protest, is not sufficient:[d] a charge of payment must be given. Neither

which must be regular.

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[b] 1793, Douglas, Heron, & Co. *a.* Trustees of Grant, Dict. v. 4. p. 103.—Affirmed on appeal, 11th Nov. 1796.—Mor. 4602.

[c] 1782, Tweedie, &c. *a.* Gibson, Fac. Coll. No 42, p. 69. Mor. 11,125. As to prescription of bills *on demand* and *at sight*, see *post.* p. 306.

[d] 1784, Douglas, Heron, & Co. *a.* Richardson, *ibid.* No 179, p. 282. Mor. 11,127.

will the sexennial limitation be affected by an informal summons, such as where the officer's execution is not authenticated in the usual manner by the subscribing witnesses:[e] Nor will it be so by the execution of a blank admiral precept, in which, according to its form, no mention is made of any particular debt; but a decree taken against one of the co-obligants in a bill before the lapse of the six years, was deemed sufficient to interrupt prescription as to all the other obligants.[f] It was also held to be a sufficient interruption, that certain bills and protests had been produced by the holders within the statutory period, in a process of ranking and sale of the debtor's estate.[g]

Partial payments.

In the long prescription of deeds, any act of acknowledgment of the debtor will interrupt the currency of prescription; but the short prescrip-

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[e] 1790, Baillie *a.* Doig, Dict. v. iv. p. 114. Mor. 11,286. It is implied in this case, that *citation* alone to an action within the six years is sufficient to interrupt prescription. See Tait on Evidence, 450. The summons ought correctly to conclude for payment only of the *debt*, and not of the *bill*. The objection, that the summons libelled the bill was, however, repelled in Clarkson's Trustees *v.* Gibson, 8th June, 1820, Fac. Coll. The raising and executing of any of the kinds of diligence mentioned in the last chapter, would probably be held, under the terms of the statute, to bar the prescription, but no cases of this nature have occurred. Such a proceeding puts the debtor on his guard as to the claim against him, and should make him careful, if he pay the debt, to take proper evidence of its discharge.

[f] 1784, Gordon *a.* Bogle, *ibid.* p. 104. Mor. 7532. But an *acknowledgment* by a joint obligant after the six years, does not preserve the bill from prescription as to the rest. Houston *v.* Yuill, Shaw's Rep. I. 449. M'Neil & others *v* Blair, *ib.* II. 174.

[g] Douglas, Heron, & Co. *a.* Richardson. Production of the bill in a process of sequestration, multiplepoinding, or any other process of competition for the debtor's funds, will have the same effect. Bell's Comm. I. 306.

tions, it is said, being grounded on a presumption that the whole debt was paid within the years of prescription, can only be interrupted by a writing which proves resting owing, and constitutes in itself a valid document of debt. Hence partial payments have not the effect;[h] and hence a decree of constitution obtained by the debtor in a bill, within six years from the date, against a person bound to relieve him, was found not to interrupt prescription in favour of the creditor in the bill, although the latter had been examined on the verity of his debt in the process of constitution, and had upon that occasion produced his bill.[i]

It was remarked from the Bench, in the discussion of this cause, that an indefinite partial payment, within the six years, may not have the effect to interrupt prescription; because it affords no evidence that the rest of the debt was then due, as it might have been extinguished by compensation or otherwise. But a payment of the interest, during the currency of the six years, will interrupt the prescription, as affording evidence that the whole principal sum of the debt was then due. If, for example, such payment of interest should take place only a day or two before the lapse of the six years, the act certainly

Payment of interest.

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[h] Ersk. b. 3. t. 7. § 39.

[i] 1795, Viscount Arbuthnot *a.* Douglas, Fac. Coll. No 164. p. 377. Mor. 11,133.

would not apply, as the legislature could not have meant to introduce a prescription of a week or a day.

The yearly payment of the legal interest of a specific sum assuredly implies, that the principal is unpaid, and is a clear acknowledgment of debt at the date of the last receipt for the interest; but, by the same rule, a partial payment, under certain circumstances, as strongly implies that the remainder of the principal sum was due, and acknowledged to be so, at the date of the payment. If a bill, for instance, be granted for L.100, and the holder marks on the back of it, "Received in part of the within sum, L.50," the only inference that can be drawn from this, as long as the bill remains unretired in his hands, is, that the balance was unpaid at the time the partial payment was made. It would appear, therefore, that a definite partial payment, and a payment of interest, ought to be governed by similar principles as to the weight given to them in estimating how far they are to be admitted as an acknowledgment and evidence of a subsisting debt.

What writs bar prescription.

Bills after prescription may be proved by the oath or writ of the debtor; but it is not specified what kind of writ, on the part of the debtor, will amount to a sufficient proof of the debt, nor does it seem to be yet very well ascertained.

In the case, Buchan *a.* Barclay, it was decided, that prescription was not obviated by a relative writing of the debtor, of equal date with the bill

itself; but, in a subsequent case, action was sustained for a debt vouched by a docqueted account and a bill, both of the same date, after the latter was prescribed.

Case of Campbell v. Campbell.

Patrick and Alexander Campbell were engaged in various joint concerns. On the 15th May, 1782, they settled accounts; and a balance of L.490 was found to be due by Alexander, for which he then granted bill to Patrick, payable three days after date. To the account thus settled, the parties at the same time subjoined the following docquet:—" 15th March, 1782. This account, containing an abstract of the accounts paid and settled of this date, being examined by the said Alexander Campbell and Patrick Campbell, it is found and declared that a balance of L. 490 sterling arises to the said Patrick Campbell, for which the said Alexander Campbell has now granted his acceptance, payable three days after date, and which, when paid, is in full of the above." Alexander Campbell died a few months after the date of this transaction. In 1793, Patrick Campbell brought an action against his trustees for payment of the debt contained in the docqueted account and bill. The Court repelled the plea of prescription, set up by the defenders to the sum of L.490, as the balance found and ascertained by the docqueted account pursued on.[l]

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[k] 1787, Dict. v. iv. p. 103. Mor. 11,128.

[l] 1797, Campbell *a.* Campbell, &c. Fac. Coll. No 24, p. 59. Mor. 1648. See Howison *a.* Howison, 1784, *ibid.* No 181, p. 285. Mor. 11,030.

Markings by debtor after six years.

A partial payment, made after the sexennial period by the accepter's heir, and marked by him on the back of the bill, was found to bar him from afterwards pleading prescription;[m] and the defence of prescription is in the same manner precluded by writings after the six years, when they amount to an admission of a subsisting debt.

Case of Russel v. Fairie.

Fairie, on the 8th May, 1782, granted to the mother of Russel, a bill of exchange for L.92, payable one year after date. On the bill were marked a variety of partial payments, the latest dated in September, 1788. Three of the markings were in Fairie's hand-writing; the last of these, however, was in 1786. After Mrs Russel's death, there having been many transactions between her and Fairie, a correspondence took place between her son and him. In March, 1789, Fairie desired Russel "to send a copy of the bill, and the payments made on the back of it, so that he might settle the balance." And in July, 1789, after the expiration of the six years, he again wrote in similar terms. At last, an action was brought by Russel against Fairie for the sum appearing to be due, after deduction of the partial payments as marked on the bill. The defender

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[m] 1784, Scot *a.* Gray, *ibid.* No 139, p. 218. Mor. 11,126. Such markings, however, must be in the hand-writing of the debtor himself, or, after his death, of his heir. It is not enough that they are written by his factor, or any person for him, still less by the creditor himself. Fergusson *v.* Bethune, 7th March, 1811, Fac. Coll.

alleged that he had made other advances to the full amount, trusting that the creditor would have carefully noted them. At any rate, he contended that the bill was no longer a probative document, being cut off by the sexennial limitation. The Lord Ordinary pronounced an interlocutor, finding, that in respect it had been decided by the Court, that receipts for partial payments within six years, do not bar the sexennial prescription of bills, when pleaded against an action brought on the bill after the lapse of the said six years; and also in respect that the defender's missive letters produced by the pursuer in this action founded on the bill libelled, do not, in terms of the statute, prove the debt as libelled, or that the same is resting owing; therefore absolved the defender, and dismissed the action. A petition for the pursuer was given in, which was followed with answers. A majority of the Court were of opinion, that the enactment of 1772 was of a similar nature with those introducing the shorter prescriptions of Scotland, and not an adoption of the English law with regard to the limitation of bills, &c.; and that neither the markings in the hand-writing of the defender, nor the relative correspondence within the six years, could save from the currency of prescription. But it was ultimately found, that the letter in process, dated 22d July, 1789, from the defender to the pursuer, after the sexennial prescription had run, did instruct that the debt was then resting owing

in part; and, therefore, repelled the defence of prescription.[n]

How long bill subsists when revived.

A doubt was stated by one of the Judges, whether an interruption of the sexennial prescription by writing was to be considered as a renewal of the voucher, so as to make room for a new course of prescription, to be reckoned from the date of the interruption, as was found in the case of the septennial limitation of cautionary engagements;[o] or whether, the operation of the statute being thus completely done away, the bill would subsist as a legal instrument for 40 years, unless, from the circumstances of the case, there arose a presumption of payment. But it was not necessary to determine the point.[p]

Acknowledgment on last day of six years.

Prescription was also considered to be barred by a writing signed by the accepter of a bill, importing an acknowledgment of the debt on the last day of the six years. In this case, it was thought that the subscription of the writing, the very day before the prescription had run, was a circumstance that afforded satisfactory evidence that the bill was not paid within the six years;[q]

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[n] 1792, Russel *a.* Fairie, Fac. Coll. No 211, p. 444. Mor. 11,130.

[o] 1715, Gordon *a.* Campbell, Dict. 2. p. 116. Mor. 11,037.

[p] The same point has since come under the notice of the Court in two cases. Horsburgh *v.* Bethune, 13th Feb. 1811, Fac. Coll.; and Fergusson *v.* Bethune, 7th March, 1811, Fac. Coll., in both of which it was found, that markings of payments of interest on the back of a bill, preserve it only for six years after the date of the markings.

[q] 1797, Executors of Lindsay *a.* Moffats, Fac. Coll. No 23, p. 56. Mor. 11,137.

and in the debate that took place on the Bench, there was a pretty full discussion of the doubt stated in the case of Russel *a.* Fairie, concerning the effect of a writing in interrupting the prescription of bills. The opinions delivered by seven of the Judges, including the Lord President, attributed the same effect to an acknowledgment of resting owing made at any time within the six years, as to one made after the expiration thereof. A distinction, it was observed, ought to be carefully taken between a bill, and the debt created by it. The statute cuts off the bill in six years; but the legislature, by doing so, did not mean to annihilate the debt at the close of that period. Its existence after the six years falls in every case to be determined by the common rules of law. A clear acknowledgment of resting owing after the term of payment of the bill, and within the six years, certainly proves the debt to be then due, and of course forms a new *terminus* from which prescription must commence. To give no effect to an acknowledgment of resting owing within the six years, in any case, where there is a possibility of the bill being paid before their completion, would be to introduce an indefinite and arbitrary course of prescription unwarranted by the statute, the length of which would depend entirely on the time which was to run between the date of the acknowledgment and the expiration of the six years, which might be only a year, a month, a week, or a day, according to circumstances.

Other seven of the Judges held a different opinion. They thought the statute rested on a presumption of payment; and that, therefore, no acknowledgment within the six years, which did not wholly elide that presumption, could bar the statute.

Whether writ *within* the six years bars prescription.

It would appear, then, from the opinions delivered on the Bench in the above case, to be still uncertain, whether an acknowledgment of the debt in the bill within the six years will prevent prescription or not. It is universally admitted, that prescription is precluded by any writing of the debtor subsequent to the six years, which proves the debt to be then resting owing. But the question is, if there be sufficient reason for denying effect to a writing within the six years, while one after that period is received as effectual. The preamble of this part of the statute bears, That it was enacted to remedy the great inconveniences that have been found, from experience, to arise from bills not being limited to a moderate endurance; and it proceeds to provide, "That no bill or promissory-note shall be of force, or effectual to produce any diligence or action, unless such diligence shall be raised, or action commenced, within six years from the terms at which the sums in the said bills or notes became exigible;" and "that it shall and may be lawful and competent, at any time after the expiration of the said six years, to prove the debts contained in the said bills and promissory-notes,

Whether writ *within* the six years bars prescription.

and that the same are resting owing, by the oath or writ of the debtor."[r]

After the six years, then, it should seem, that the subsistence of the debt may be proved by the oath or writ of the debtor. But no written acknowledgment, it is said, which is given within the six years, can be admitted as evidence; because the law presumes, that payment must have been made subsequent to such acknowledgment, and before the expiration of the six years. The words of the statute, however, do not seem to sanction this presumption. On the contrary, an action is competent on the bill after the expiry of the six years, in which the creditor is entitled to prove the existence of the debt by the debtor's writ or oath. In a common action of debt, the Court must judge by the ordinary rules, whether such proof has been adduced as satisfactorily establishes that the debt is, or is not, resting owing; and for that purpose must take into consideration writs granted before the six years, as well as those granted after. The act does not say, that no relative writ within the six years is

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[r] This part of the act is far from being clear, and certainly does not express what writs are to be received as evidence of the existence of the debt. If no bill is effectual to produce an action, unless such action be commenced within six years, it might be maintained, that no prescribed bill could be a proper ground of action at all. But this is evidently a quibble; for, without an action, it would be impossible to prove the debt to be resting owing. It is unfortunate, however, that the words of the statute are not more precise and explicit on a point, which is undoubtedly of high importance.—A.

to be received as evidence of the debt being resting owing at the expiry of that time; and it is but reasonable to admit such writ, to prove, that the debt existed at the date of the writ. The presumption of payment afterwards, is always opposed by a contrary presumption. When the debt in a bill is paid, the document is usually delivered up to the debtor; from which the general presumption arises, that, as long as it remains with the creditor unretired, the debt is due. The statute, to obviate the inconveniences produced by bills being kept too long up without a demand being made, limits this presumption of common law to six years; but it still reserves to the creditor the power of proving, after the six years, by the debtor's writ or oath, that the debt was not extinguished. The statute, therefore, does not rest on a presumption of payment, but merely limits, in the case of bills, to six years, the doctrine and presumption, that these documents, when unretired, are unpaid. Where the debt, therefore, is proved, by a writing granted within the six years, to have existed at the date of that writing, the limitation of the statute, of the presumption with regard to unretired documents, ought to run, not from the original date of the bill, but from the date of the writing by which the debt was shown and ascertained to be subsisting. If the presumption of payment within the six years is, in all cases, to be taken as a rule, no written acknowledgment of resting owing granted after

Whether writ *within* the six years bars prescription.

Whether writ *within* the six years bars prescription.

that period ought to have the power of reviving the bill, however good such acknowledgment might be as a voucher of debt by itself; or if it have such power, it is not very apparent why a writ of the same nature, within the sexennial period, should not have a similar effect. If a writ, granted ten years after the date of the bill, does away the presumption of the first six years, and resuscitates the debt in the bill, so as to make it run a new course of prescription from the date of the writ, it would be somewhat inconsistent to deny any effect whatever to a writ granted five years from the date of the bill, merely on the presumption, that payment was made within the subsequent year. This presumption, as has been already observed, the act does not appear to warrant. The longer the space is that has elapsed from the original constitution of the debt, the stronger is the presumption of payment; and if prescription is to be obviated by a written acknowledgment after the six years, it might be fairly argued, that *a fortiori* ought it to be so by one granted within a shorter period; and a new course of prescription may be admitted in the one case as well as in the other. Besides, it has been found in the septennial prescription of cautionary obligations, that a promise contained in the cautioner's missive letter, within the seven years, was sufficient to interrupt prescription, so as to make it run a new course from the date of the letter; the let-

ter being held as a new cautionary obligation.[s] And the same doctrine, when applied to bills, would be no infringement of the law with regard to short prescriptions.[t]

Whether writ *within* the six years bars prescription.

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[s] Gordon *a.* Campbell, Dict. 2. 116. Mor. 11,037.

[t] Bills of exchange and promissory-notes in England fall under the statute of limitation of 21 James I. c. 16. Any acknowledgment of the debt, however, or partial payment, or verbal promise, made within the six years, bars the limitation. 2 Blackstone's Reports, 703. Douglas' Rep. 652. Whitecomb *v.* Whiting. Couper's Rep. 189. Hawkins *v.* Saunders. Blackstone's Com. b. 3, c. ix. Kyd, p. 200. Manning, p. 52. MacDoual's Inst. b. 2, tit. 12.—See also 1775, Creditors of Renton *a.* Baillie. Sel. Dec. No 85, p. 113. Mor. 4516. A bill or note, if above six years' standing, will support, or may be proved under, a commission of bankruptcy; for the debt still exists, and no one but the holder can avail himself of the statute of limitations; but where the bankrupt himself applied to set aside the commission, on the ground, that the petitioning creditor's debt was discharged by the statute of limitations, it was accordingly superseded. Chitty, p. 228. In France, bills run a prescription of five years from the time they fall due, if not protested; or, if protested, from the date of the protest; or, if any other demand or suit has taken place, from the date of the last demand or suit. Ord. 1763, tit. 5, art. 21. Poth. n. 197. In Holland, bills prescribe in eight years.—A.

The position maintained by the author in the text, that writings of the debtor, within the six years, should be admitted to obviate prescription, though perhaps not inconsistent with the words of the statute, appears to be quite at variance with its spirit. The object of the act was, to compel the settlement of bill-transactions within the period of prescription, and thereby to remove the evil, of claims upon bills being brought against the obligants, at the distance of a long course of time, when no certain evidence could be procured of their being really due. A presumption (similar to what is held in the triennial and quinquennial prescriptions) that bills are paid within the six years, and the obliging the holders, after that period, to trust their claim to the oath of the obligants, (unless they can contradict the presumption by written evidence under the obligant's hands, dated after the six years, or have placed the debt upon a secure footing by action or diligence within that time,) was well calculated to effect the purpose of the legislature. But if writings within the six years, recognising the debt, were admitted to obviate the prescription, this purpose would be entirely defeated. For, when the holder of a bill was

Rule as to bills at sight.

As bills payable at sight are not exigible till presented, prescription of them must run from the day they were presented.[u]

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possessed of such a writing, he would cease to have any interest to obtain a settlement of the debt; the writing would at all times be a sure answer to the plea of prescription. Besides, though, in the case of the executors of Lindsay *v.* Moffats, the admission of such writings only, as are dated after the bill had become due, seems to have been contemplated, it does not appear evident, if "the existence of the debt, after the six years, is in every case to be determined by the common rules of law," how writings before the date of the bill, out of which it arose, can be excluded. The *debt* was as much due then as it was after granting the bill, and these writings may afford complete proof of it. It is evident that the writings of the obligants, relating to the debt, which may have come into the holder's possession, either before or after the granting of the bill, must, in many cases, be obscure, inconsistent, and informal, particularly if there should happen to have been involved transactions between the parties. The consequence of the author's construction of the act would therefore be, to remove, in many cases, all inducement to the bill-holder to recover payment within the years of prescription, and, in proving the debt, to substitute for the bill which is destroyed by the statute, all the loose jottings and communications which may at any time have passed between the parties.

That construction of the act, which holds the prescription to be barred only by writings granted *after* the six years, by which alone the presumption of payment within that period is obviated, seems best to agree with its object. No doubt, in the case of the triennial and quinquennial prescriptions, writings of the debtor within the years of prescription, acknowledging the debt, afford an answer to the presumption of payment; but this happens from the very nature of these prescriptions, as applicable to claims that are of a loose and floating description, and ceasing to operate against debts, when removed, by the interposition of writing, from the class to which they apply. The prescription of bills was, in like manner, intended to prevent demands at remote periods, founded on docu-

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[u] In Stephenson *v.* Stephenson's Trustees, 16th June, 1807, prescription of a promissory-note, payable on demand, was held to run from its date; Mor. App. to Bill, No 20. A similar decision was pronounced on the same date, in M'Cook *v.* MacJanet, in a question as to a *bill*, payable on demand, *ib.* note.

The right of action by an accepter, who has paid the contents of a bill, without having funds

Accepter's claim against drawer not affected by sexennial prescription.

ments of so slight a nature, which might through negligence have been left in the creditor's hands after a settlement of the debt; but it cannot be supposed, that the legislature meant to substitute the casual and irregular writings, which may prove the existence of the original debt, for the bill, which probably is by far the most formal and distinct of the whole. Such writings, evidently, do not alter the character of the debt, and remove it from the class to which the sexennial prescription applies; and therefore they cannot obviate the presumption of payment, on which the short prescriptions are founded. Should such a writing, however, be in the possession of the holder of a bill, as changes the nature of the debt, *e. g.* a bond or other formal obligation, or an assignation to an heritable security, or, as in the case of Campbell *v.* Campbell, *sup.* p. 296, a regular docqueted account, then the prescription to which these other securities are subject will apply, and the obligants will be liable in payment during the period of such prescription, unless they can produce a regular discharge.

The author states, that there is nothing in the statute, from which it can be held, that it proceeds on a presumption of payment within the years of prescription. The same may be said of the triennial and quinquennial prescriptions, which, it is reasonable to suppose, the legislature had in view at introducing a similar limitation of bills. The statutes establishing these prescriptions are conceived in general terms; and a presumption of payment, which has been engrafted on them, must, therefore, be regarded as the principle which the law of Scotland applies to short prescriptions in general. The septennial limitation of cautionary obligations, which is referred to in the text, is not analogous to the other short prescriptions. Its object has no reference to the manner in which the claim is constituted, but is to prevent the bad consequences of imprudent cautionary, by annulling the obligation altogether after the lapse of seven years. This prescription thus does not proceed on the presumption of payment; and the original obligation cannot be continued, by any writing granted within the years of the limitation, beyond that period. A new cautionary may, however, be validly entered into during the currency of the seven years, which will run a new course of prescription.

The cases of Buchan *v.* Barclay, and Russel *v.* Fairie, finding that the sexennial prescription can be obviated only by writings after the six years, have been confirmed by Fergusson *v.* Bethune, 7th March, 1811, Fac. Coll. One class of the bills sued for in this case, had markings of payments of interest on them,

in his hands, against the drawer for re-payment, is not affected by the sexennial limitation, seeing that the debt in the bill is discharged by the payment, and the drawer is merely debtor to the accepter for the sum that the latter has disbursed on his account;[v] and the same rule applies to the action of the drawer against the accepter, who, with effects in his hands, has allowed the bill to be protested and returned.[w]

Minors exempted from prescription.

Prescription runs regularly against minors as well as others, unless they be specially exempted by statute; and, in Scotland, minors are secured in this way from the effect of most of the prescriptions; for, during the years of minority, they are supposed incapable of managing or looking after their affairs; and it would be unjust to subject them to the operation of any law by which their rights might be affected, as long as this incapacity subsists. It is therefore enacted, by § 40 of the foregoing statute, "that the years of the minority of the creditors in such bills or notes, shall not be computed in the said six years."—In England, it is provided that the limitation of six years shall not run against minors and *femmes couverts*, or where the person entitled to bring

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in the debtor's hand-writing, within the six years. Lord President Blair said, he considered it clear, that these markings did not preserve these bills from prescription, but, on the contrary, rather strengthened that plea; and judgment was pronounced accordingly. Similar markings on other bills, but without the six years, were held to obviate prescription.

[v] 1792, Ralston *a.* Lamont, Fac. Coll. No 111, p. 443. Mor. 1533. Poth. n. 198.

[w] Poth. n. 199.—Sav. Parere, 72.

the action, or against whom the claim lies, is beyond seas.[x]—In France, where bills prescribe in five years, prescription is not interrupted by minority, or any privilege whatever,[y] though, for this, no adequate reason seems to be assigned.

Oath of party.

After prescription, no summary diligence can proceed on a bill, though the debtor's oath should have proved the debt. The debt may be thus revived; but the document remains prescribed, at least its extraordinary privileges cease.[z] And it has been decided, that, even without the debtor's oath, an onerous indorsee is entitled to demand payment of a prescribed bill, although it was accepted solely for the accommodation of the drawer, the accepter's subscription not being denied, nor payment alleged.[a]

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[x] 21. James I. c. 16 § 7.—5 Annæ, c. 16.

In Brodie *v.* Sheddan, 20th Feb. 1821, Fac. Coll., it was urged by the holder of a bill, who pursued an action against the debtor twenty-two years after it fell due, that the latter had been, during the whole of that period, under sentence of outlawry, and had therefore forfeited for a time the rights and privileges of a citizen. This was not regarded by the Court, who dismissed the action. See also M'Neill & others *v.* Blair, 31st January, 1823. Shaw's Rep. II. 174.

[y] Ord. de Com. tit. 5. art. 21, 22.—Sav. tom. i. ch. 6.—Poth. n. 206.

[z] 1804, Armstrong *a.* Johnstone, Fac. Coll. No 158, p. 357. Mor. 11,140.

[a] 1800, Philp *a.* Milne, *ibid.* No 155, p. 349. Mor. App. to Bill, No 9. This case must have been decided on a specialty. Had the debtor, when the action was brought, simply pleaded prescription, without entering into any detail about the cause of granting the bill, he certainly would have been entitled to the benefit of the statute.—A.

The above decision is now held to be erroneous. The obligation under the bill being discharged by the statute, the holder

must establish an actual debt by the obligants, independent of the bill. See Bell's Comm. I. 306, and *addenda*, No 13.

For the general nature of an oath of reference, see *sup.* p. 77, note [x]. The obligants, in their oath, are entitled to state circumstances affecting the original constitution of the bill, as well as the present subsistence of the debt. In Agnew *v.* M'Rae, 20th Feb. 1782, Mor. 13,219, the defender deponed, that he had got no value for the bills in question, and had signed them by mistake instead of receipts, which was found an intrinsic quality. Grant *v.* Grant, June 1793, Mor. 13,221, in which a deposition, that the pursuer had agreed to cancel the bill, the parties having discovered that he was owing the defender a greater sum, was also held to be intrinsic. See to the same purpose, Fraser *v.* Fraser, 27th June, 1809, Fac. Coll.

On the other hand, the qualifications in the depositions were found extrinsic in the following cases:—Rankine *v.* Adair, 29th June, 1799, Mor. 13,245, in which a variety of counterclaims were stated, incurred, as the defender alleged, on the faith of the bill. Macneill *v.* M'Kissock, 28th Feb. 1805, Mor. App. to Oath, No 1, in which the deposition bore, that the value of the bill was smuggled goods, and that as the accepter was a great loser by the bargain, he did not look on himself as owing the balance unpaid. This decision, however, is now regarded as questionable. Though it is necessary that the debtor himself, when he alleges payment in his deposition, state when and how it was made, his representative, if it appear he has no means of being acquainted with his predecessor's transactions, is not under the same necessity. An answer from him, which resolves into a denial of all knowledge on the subject, and does not prove the subsistence of the debt, will not avail the pursuer. See Stirling and others *v.* Henderson, 11th March, 1817, Fac. Coll. Tait on Evidence, 244.

# CHAP. XII.

## OF BILLS IN RELATION TO BANKRUPTCY.

It is an object of considerable importance, to inquire into the manner in which bills are affected by bankruptcy, and to ascertain how far, from the legal disability thereby created, the debtor is debarred from making any transfer of his property by drafts or indorsations, and his creditors are entitled to challenge such transactions. The respective claims, too, of bankrupt-estates on each other through the medium of bills, which are often exceedingly intricate, and of difficult adjustment, well demand our attention. The subject of this chapter, therefore, may be divided into two parts: 1st, Whether, after bankruptcy, bills can be effectually drawn, accepted, or indorsed by the bankrupt, or paid by him; and, 2dly, Upon what principles the claims of ranking and cross-ranking for indorsed bills by bankrupt-estates upon each other, are to be, or have by the Supreme Court been regulated. Under which divisions may be discussed, at the same time,

any collateral points connected with, or bearing in any material respect on these branches of the subject.

Statutes preventing fraudulent preferences.

I. Bankruptcy is an open and public declaration of failure; and, in Scotland, it is assumed as a fair presumption, that for sixty days before notorious bankruptcy, the debtor must have had his failure in contemplation. Upon this ground, therefore, the bankruptcy is held to have begun at that period, to the effect of entitling the creditors to challenge all voluntary securities, and to level all preferences constituted within that space of time.[a] To prevent, as far as possible, fraudulent embezzlement and alienation by the bankrupt of his property, by collusive deeds, laws have been enacted against gratuitous conveyances and fictitious debts; and with the view of obviating those unfair preferences, which a person, whose circumstances are involved, is apt, from partiality or the dread of diligence, to communicate to particular creditors, the statute 1696, c. 5, after describing the particulars that constitute bankruptcy, declares, "that all and what-

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[a] Bell's Comm. (4th ed.) II. 166, *et seq.* The rules regarding the equalizing of preferences obtained over a bankrupt's property by means of *diligence,* are stated at the end of ch. xx., where it was found more convenient to place them. Reference is also made thither for an explanation of what constitutes bankruptcy.

[b] Act 1621, c. 18. See Bell's Commentaries on the municipal and mercantile law of Scotland, considered in relation to the subject of bankruptcy,—a work of extensive information and unquestionable utility.—A.

soever voluntary dispositions, assignations, or other deeds, which shall be found to be made or granted, directly or indirectly, by the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favours of any of his creditors, either for their satisfaction or further security, in preference to other creditors, shall be void and null."

Application of act 1696.

This statute is confined to deeds granted in satisfaction or security of former debts. It does not therefore apply to new transactions, for a person with whom the debtor enters into a new contract, which is begun and finished as one act, whether it be a sale of lands or of goods, or even a loan of money in security, is in no sense a creditor at the time of entering into the transaction, nor does he obtain a preference to the prejudice of other creditors. Bills of exchange, consequently, granted or indorsed for value received at the time, do not fall within the act,—as was indirectly found in the case of Campbell *a.* Graham,[c] which arose on an indorsation made within the sixty days, wherein it was decided, "that the act of Parliament took place, if the pursuer proved that the indorsation was for satisfaction or security of a prior debt, and not for present value received;" which implies, that if he failed in this proof, the transaction was good.

It does not apply to bills granted or indorsed for present value.

Many questions occurred respecting what was

Whether date of *completion* true date of transference.

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[c] 1713, D. Forbes, p. 646. Dalrymple, No 97, p. 136. Mor. 1120.

to be considered as new debts, or deeds granted in security in terms of the act, and the modes of completing the creditor's right. No title to land is complete, till seisin or infeftment has followed on the conveyance. The act therefore declares, "that all dispositions, heritable bonds, or other heritable rights whereupon infeftment may follow, granted by the foresaid bankrupts, shall only be reckoned, as to this case of bankrupt, to be of the date of the sasine lawfully taken thereon, but (without) prejudice to the validity of the said heritable rights as to all other effects as formerly."[d] However this part of the statute may apply to real or heritable rights, a conveyance of moveables, made in consideration of a sum advanced, cannot be considered as a security for a former debt, merely because the last act of its completion was posterior to the moment of advance. An assignment, in security of certain debts previously due, and of a sum of money instantly advanced, executed several months before the assignor's bankruptcy, though not intimated till within sixty days thereof, was found not to fall under the rule of the statute.[e] And upon the same principle, if a bill be drawn by a merchant on his correspondent in favour of one who advances money for it, strictly speaking it is neither a security nor a conveyance till accepted by

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[d] The date of recording the sasine is now the rule by § 12 of 54 Geo. III. ch. 137.

[e] 1788, Hay *a.* Sinclair, Fac. Coll. No 28, p. 45. Mor. 1194.

the draweé; yet the circumstance of the date of the acceptance being posterior to the advance, will not entitle the creditors of the drawer to challenge it as a security for a prior debt.[f] The drawer, in this case, has done his part in completing the right of the creditor, to whom the transference is made; the procuring acceptance of the bill is an act to be accomplished without the interference of the bankrupt.[g] But where any thing is required to be done by the bank- Additional acts by bankrupt.

[f] Bell's Comm. II. 233.

[g] A distinction must be taken between the cases mentioned in the text. The act 1696 is held to affect only conveyances granted in favour of *prior* creditors of the bankrupt, affording these creditors a preference over the rest; and in order to destroy such preferences the more effectually, by preventing the conveyances from being kept latent, the act declares the sasine on heritable rights to be the criterion, by which the date of the security is to be judged of. It thus does not in the least affect securities, whether real or personal, for new debts, granted at the time the loan is made,—such as an heritable bond, or a bill drawn on a correspondent, for money instantly advanced, even though these should not be completed till within the sixty days, by infeftment on the bond, or acceptance of the bill.—See p. 313, *sup.* The case of Hay *v.* Sinclair is in a different situation; the assignment there was partly in security of *former* debts, and the decision ought perhaps, so far as it was so, to have held the date of *intimation* to be the true date of the assignment, in conformity with the spirit of the act, and of the clause already quoted. The Court, however, were of opinion, that the words of the act could not be extended beyond the completion of heritable rights, and that moveable rights were left to be governed by the date of the security itself. The late bankrupt act supplies this defect, and declares, that in questions under the act 1696, "all dispositions, assignations, and venditions, which do not require sasine, but to which intimation or delivery are requisite, in order to render them complete as transferences, or as securities, shall be reckoned to be of the date of the intimation, delivery, or other act requisite for completing the same, without prejudice to their validity in other respects."

In the case of a bill drawn, not for money instantly paid by

rupt himself, in order to make the right effectual, the question is more difficult. If the bankrupt interferes to do that only, which both parties understood to have been done at first, and on the faith of which the money was advanced, the act is not objectionable, nor such as to entitle the creditors to separate the security from the advance; but where he does that, which both parties understood he had not done at first, and which he only bound himself to do, it is objectionable, and the creditors are entitled to reduce it.

Case of More *v.* Allan.

Of the former case, there is an example in a question that occurred in 1800, where a merchant in this country having drawn bills on his correspondent in London for the amount of a cargo consigned, indorsed away the bills for value, and thereby raised money on the faith of their being accepted. The consignment was, however, rejected, and acceptance refused; upon which, the cargo was given over to another house in London, upon whom new bills for the exact amount of the former were drawn and indorsed in lieu thereof. These new bills were challenged on the act 1696, as given in satisfaction of a prior debt, but the Court refused to sustain the action. The particulars of the case are as follow:—

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the payee to the drawer, but in satisfaction or security of a former debt, it would appear that, under the above clause, its validity will be governed not by the date of the bill, but of the acceptance or refusal of acceptance, which acts complete the transference of the fund in the accepter's hand.—Bell's Comm. II. 243.

About the middle of March 1796, Sinclair & Williamson consigned a cargo of wheat, belonging to them, to Scott of London, and indorsed the bills of lading to him. Upon the 16th of the same month, they drew a bill for L.1000 upon Scott, and indorsed the said bill to Allan, the defender in the cause, for value given of that date. On the 18th of the same month they drew another bill for L.1200 upon Scott, and indorsed it to Allan, for value given of that date. The value of the cargo of wheat exceeded the amount of these two bills, which were drawn by Sinclair & Williamson upon Scott, and indorsed to Allan, in the view of the consignment of said cargo. Scott, the intended consignee, refused to receive the consignment of the cargo of wheat, and likewise to accept the said two bills drawn upon him and indorsed to Allan. The cargo and bills of lading were thereupon given to Ross of London, who, upon the 29th of March, 1796, accepted two bills drawn by Sinclair & Williamson, one for L.1000 and the other for L.1200, which were indorsed to Allan in lieu of the two former bills drawn on Scott, the intended consignee. Sinclair & Williamson were rendered bankrupt in the beginning of April. In these circumstances, the Lord Ordinary decided, "That the bills last granted ought not to be considered as falling under the act 1696;" to which judgment the Court adhered, by refusing a petition without answers.[h]

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[h] On the same principle, it has been decided in England,

Case of Brough's Creditors v. Spankie & Jollie.

The latter case is exemplified by a cause that was tried in 1793,—the trustee for the creditors of John Brough *a.* Spankie and Jollie.

G. Spankie and J. Jollie, on the 6th of October, 1787, accepted a bill along with Brough for L.500. Of the same date, Brough granted a holograph missive, acknowledging that they were merely cautioners for him in the bill, and obliging himself to grant them an heritable security over certain property, in relief of their obligation. An heritable bond was accordingly made out in their favour, on which they were infeft on the 7th December following. Brough having been rendered bankrupt within sixty days thereafter, the trustee for his creditors objected to the heritable security, as falling under the retrospect of the act 1696. And the Court unanimously sustained the objection.[i]

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that an omission to indorse a bill, which has been delivered for value to a holder, may be supplied, without challenge, after the commission of an act of bankrupcy. Smith *v.* Pickering, Peake's Cases, 50. Anon. 1 Camp. 492, Notes. Chitty, 116.

[i] Brough's creditors *v.* Duncan & Jollie, 5th June, 1793.—Mor. 1160. Brough's creditors *v.* Spankie & Jollie, same date. Mor. 1179. The question involved in these cases is attended with difficulty,—Whether a security which is only stipulated for at the time of the advance of the money, and not granted till within sixty days before the bankruptcy, is to be considered as a security for a prior debt, or as a part of the original transaction? The decisions of the Court have fluctuated very much on the cases of this nature which have occurred, and the point cannot be considered as settled. See the different authorities stated in Bell's Comm. II. 235-7. In the last case on the subject, Bank of Scotland *v.* Stewart & Ross, 7th Feb. 1811, Fac. Coll. it was held, in opposition to the cases above quoted, that a security, granted in consequence of an agreement of this sort, did not fall under the statute. Mr Bell is of opinion, that

Though, therefore, the payee or indorsee of an unaccepted bill may complete the transaction by afterwards procuring the acceptance of the drawee, because, by the draft or indorsation alone, the whole right is fully transferred from the drawer or indorser, yet, it is not safe to grant bills to any person in exchange for a personal obligation to give security, which may require his interference afterwards to make it effectual by a voluntary deed.

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where there is merely a general engagement at the time of the advance, to give the creditor security for the debt, such as, a merchant agreeing to pay "in cash or good bills," and receiving commodities in reliance on this engagement; bills delivered to the seller within the sixty days, ought to be reckoned as securities for a prior debt. But that where a specific security over a particular subject is bargained for, such security, though granted after an interval, and within the sixty days, ought to be unobjectionable. Some regard should also, perhaps, be paid to the time, at which the stipulated security is actually granted. When a security, which a creditor expects for his debt, cannot, for some sufficient cause, be prepared before the advance of the money, but the creditor stipulates expressly that it shall be granted, and proceeds forthwith to take the steps necessary for vesting it in his person, he may with reason maintain, that he cannot be held to have obtained a fraudulent preference over the other creditors, because he has received only what he bargained for; that it is to be presumed he would not have lent his money, except upon the understanding, that he was to receive this security; that the whole transactions are to be regarded as one continued act; and that, therefore, he is in the same situation as a creditor receiving a security for money instantly advanced. But, on the other hand, if a delay take place in completing the security greater than is necessary for that purpose, the other creditors might plead, that the lender has by his own behaviour declared, that he no longer trusted to the security stipulated for, but was content, like themselves, with the personal credit of the bankrupt; and that it would be unjust, after remaining a mere personal creditor for a considerable length of time, that he should be enabled, in virtue of a stipulation, which he kept latent, and did not act upon, to secure a preference over the bankrupt's property, which they are prevented from obtaining.

Payments in cash unexceptionable,

Payments in cash by the bankrupt, within the sixty days, are not struck at either by the act 1621 or 1696.[k] A person insolvent, discounted, by the assistance of his ordinary agent, who did not know his real situation, bills which he had in his possession, to the extent of L.272, and, with the money, paid the debt and interest in a bond for L.240 owing by him to his sister, and was afterwards made bankrupt within the statutory period. The payment was sustained.[l] But no collusive payment made in this way will be considered effectual; as, for instance, where a bill is discounted by the creditor in the knowledge of his debtor's circumstances, and the money applied in payment of his own debt; or, where the bill, with the assistance of the creditor, is discounted in the bank, and the value given in bank-notes to the debtor, who afterwards delivers them in payment to the creditor. For these are evidently reprehensible modes of evading the act, and an unfair attempt at obtaining a preference within the statutory period.

unless fraudulent.

Where bills were indorsed by a person in Scotland before his bankruptcy, to his agent in England, who was considerably in advance for him in a business of selling goods on commission, and who placed them to his credit, although they did not fall due till after sequestration was awarded

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[k] 1733, Buchanan *a.* Arbuthnot, Dict. v. i. p. 82.—Mor. 1128.—1751, Forbes *a.* Brebner, &c. Kilkerr. No 15, p. 62.—Mor. 1042.

[l] 1760, Bean *a.* Strachan, Dict. v. iii. p. 48.—Mor. 907.

against him, they were found to be equivalent to payments of the date of the indorsations.[m]

As payments *by* the bankrupt, are not comprehended under the term "deeds;" so, payments *to* him, can in no sense be viewed as deeds of preference. Bills, therefore, due to the bankrupt, may be paid to him at any time within the sixty days. But by the bankrupt statute 33. Geo. III. c. 74, § 29, it is declared, that "after the date of the first deliverance upon the petition (of sequestration), all payments made by the debtor to any of his creditors, shall be void and insufficient to the receivers, in the event of a sequestration taking place; and the trustee shall be entitled to recover the money so paid as part of the bankrupt estate.[n]

Payments to bankrupt.

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[m] 1790, Sandeman & Graham's Assignees *a.* Stein, Bell's Cases, p. 81.

[n] In England, by the 19. Geo. II. c. 32. "no person who is or shall be really and *bona fide* a creditor of any bankrupt, for or in respect of goods really and *bona fide* sold to such bankrupt, or for or in respect of any bill or bills of exchange, really and *bona fide* drawn, negotiated, or accepted by such bankrupt, in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignee, or assignees of such bankrupt's estate, any money which before the suing forth of such commission was really and *bona fide*, and in the usual and ordinary course of trade and dealing, received by such person or any such bankrupt, before such time as the person receiving the same shall know, understand, or have notion of, that he is become bankrupt, or that he is in insolvent circumstances."

If a debtor, after a secret act of bankruptcy of his creditor, gives him his acceptance in discharge of the debt, he may afterwards pay such acceptance to the holder of the bill, though, after the acceptance and before the bill fell due, he heard of the drawer's bankruptcy; the giving, indorsing, or accepting a bill, being considered as an immediate payment within the meaning of the statute of 1. James I. which protects *bona fide* payments made

Application of statute to payments by bill.

In considering the rapidity of mercantile dealings, and the mutual confidence of the parties, so essential to all commercial purposes, the question is naturally suggested, Whether the transactions by indorsations, drafts, &c. of merchants with their bankers, or with each other, carried on in the course of trade, and without any suspicion of fraud, down to the bankruptcy of one of them, are to be looked upon in the light of cash-transactions, or as falling under the general scope of the act?

Case of Stein's Trustee *v.* Sir W. Forbes & Co.

A case of this sort came to be determined in 1791. Stein, an extensive distiller at Kilbagie, had a variety of dealings with Sir William Forbes & Co. bankers in Edinburgh. Sometimes the bills discounted by Stein being considered as cash, were immediately carried to his credit in his account-current; but more frequently no credit was given for the contents of the bills indorsed to or deposited with the company, till they were paid by those who were immediately liable for them. Stein, on the 28th February, 1788, was rendered bankrupt. On the 29th December, 1787, being the sixty-first day before the

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to a bankrupt, provided the bill is honoured when due.—5. 7. Durnf. & East, 711.—A.

The clause quoted in the text is continued in the present bankrupt act, 54. Geo. III. ch. 137, § 38, with this qualification, "that nothing herein contained shall oblige the debtor of a bankrupt, who has paid his debt to him *bona fide*, before he knew of the bankruptcy, to pay it a second time to the trustee." See *sup.* p. 167, note [n].

In England, *bona fide* payments have been still farther protected by Sir S. Romilly's act, 46. Geo. III. ch. 135.

bankruptcy, the sums due by him to the bank amounted to L. 9868 : 10 : 5; but the company held in their hands bills, and other securities deposited by Stein, to a much larger amount. During the sixty days, however, which immediately preceded the bankruptcy, Sir William Forbes & Co., having no suspicion of Stein's failure, advanced large sums for him. At the date of the bankruptcy, the balance against Stein was L. 34,636 : 11 : 10. Besides, in consequence of bills due by him, which had been discounted by other people at the same banking-house, he was debtor to the company in a further sum of L. 15,000. But during the same period he had deposited bills to the amount of L.18,458 : 2 : 4; so that the advances exceeded the deposites by L.6309 : 13 : 1. The sums deposited within the sixty days being L.18,458 : 2 : 4, were challenged under the act. But the Court were unanimously of opinion that the case did not fall under the enactment, and repelled the objection to the claim of Sir William Forbes & Co.[o]

The decision in this case went entirely upon the specialty, that the payments within the sixty days had not only equalled, but exceeded the value of the indorsations; so that, instead of a preference or advantage being given to Sir Wil-

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[o] The trustee for Stein's Creditors *a.* Sir William Forbes & Co. Fac. Coll. No 169, p. 343. Mor. 1142. See another case, decided on the same principle, Richmond & Freebairn's Trustee *v.* the Pelican Insurance Office, 26th June 1805. Mor. App. to Bankrupt, No 24.

liam Forbes & Co., they would, if restored to their situation as at the commencement of the sixty days, have been great gainers.

But so strictly is the statute applied to securities for former debts, that the shortest interval of time, between the advance of the money and the granting of a security not originally stipulated or relied on, is fatal to the preference.[p]

Case of Hotchkis *v.* Royal Bank.

A large advance was made by the Royal Bank to Bertram, Gardner, & Co. at a time when they were exerting themselves to avert the bankruptcy, which afterwards overtook them. This

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[p] The Court have of late relaxed considerably the strict interpretation of the statute contended for in the text, as affecting the drawing and indorsation of bills in favour of creditors, though within the sixty days. Considering bills as the medium by which mercantile transactions are in a great measure carried on, they have protected such payments made by means of them, as were in the ordinary course of business, without the appearance of an intention to get an advantage over the other creditors. Thus, in Dundas *v.* Smith, 2d June 1808, Mor. App. to Bankrupt, No 28, the indorsation of two bills within the sixty days, in part payment of a balance due on an account between brokers and underwriters, though there were no counter-advances within that period, was sustained, on the ground that, in the circumstances of the case, these were payments in the ordinary course of trade. For the same reason, payment of a bill, when due, by an indorsation or draft, is unchallengeable. See Jamieson *v.* Ferrier, 23d January, 1810, and Ferriar *v.* Newton, 2d June, 1808, unreported, cited by Bell, II. 229. On the other hand, if the indorsation or draft be made for payment of a protested bill, or in security of a debt not due, or if there are any circumstances which lead to a belief, that it has been taken from the fear of the approaching bankruptcy of the debtor (as in the case of Hotchkis *v.* the Royal Bank, *post*), the statute will be applicable. In Manson *v.* Angus, 16th July, 1771, Mor. App. to Bankrupt, No 7, the depositation of bills of exchange, in security of bills past due, was held invalid, and the decision was affirmed in the House of Lords, 22d March, 1774. See Bell's Comm. II. 227-9.

advance was made at ten o'clock in the morning. In the course of the forenoon, the Bank began to fear for the credit of the house, and having insisted for security, Bertram, Gardner, & Co. deposited bills with them to a large amount. This was challenged upon the statute, as the constitution of a security for a prior debt. When the cause came into Court, it was the general opinion of the Judges, that the security was objectionable in so far as it applied to prior advances; upon understanding which, the Royal Bank at once renounced any claim upon these bills as security for the prior advance, so that the question did not come to judgment.[q]

Bills indorsed in security challengeable.

As bills deposited in security within the sixty days may be re-demanded by the bankrupt's creditors, so there can be as little doubt, that bills indorsed, or delivered in payment of prior debts, within that period, fall likewise under the statute. It has been well observed, that a debtor may gratify a favourite creditor, either by drawing a bill in his favour upon some of his debtors, or by indorsing to him a bill which stands in his person. But if the act do not strike at such deeds as these, it is plain that a trader has it in his power, upon the eve of bankruptcy, and within the sixty days, to distribute among his favourite creditors the whole of his circulating capital, except the goods in his warehouse; nay, even these also may be thus disposed of, if he choose to sell them, and take the bills for the

[q] July, 1796, Hotchkis, Trustee for the Creditors of Bertram, Gardner, & Co. *a.* the Royal Bank, Bell, II. 230.

price payable to the creditors. It were therefore a great imperfection if the statute did not include such deeds; but the words are fully adequate to include them, and the spirit of the act is strongly applicable. The act strikes against "all dispositions, assignations, or other deeds, made and granted in favour of creditors, either for satisfaction or further security, in preference to the other creditors;" and an original draft in the creditor's favour, or an indorsation to a draft in which the bankrupt is creditor, is strictly and properly an assignation for satisfaction or security, in preference to the other creditors. It was accordingly decided, in a question that occurred in 1700, that a bill drawn in favour of a creditor within sixty days of the drawer's bankruptcy, was reducible on the act 1696.[s] In the case of Campbell *a.* Graham, already quoted, the question again occurred. An indorsation by a debtor to his creditor within the sixty days, was challenged on the statute. The Court found, "that the act of parliament 1696, concerning bankrupts, takes place, if the pursuer prove that the indorsation was for satisfaction or security of a prior debt, and not for present value received."[t] A similar judgment was pronounced in the year 1780. Fletcher indorsed two bills to Campbell & MacGibbon, who were his creditors. Another cre-

Cases.

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[r] Bell, II. 220. The doctrine in the text must be taken under the exception of payments by bills in the course of trade. *Sup.* p. 324, note P.

[s] Durward *a.* Wilson, Dict. v. 1. p. 82; Mor. 1119.

[t] 1713, Forbes' Decisions, p. 646; Dalrymple, No 97, p. 136; Mor. 1120.

ditor, before the expiry of the sixty days, rendered him bankrupt, and brought an action of reduction of the indorsations against Campbell & MacGibbon, the indorsees. The foregoing cases were founded on as decisive of the question. The Lord Ordinary found the bills subject to be reduced upon the act 1696, and the defenders liable to repeat the payment of them, which they had received, for behoof of the pursuer and the whole creditors of Fletcher.[u] A distinction was hinted at on the bench, between the case of a creditor dwelling at a distance, and one at hand, receiving a payment. This distinction, however, has been since disapproved of; and in a case decided 20th May, 1794, MacHutcheon *a.* Welsh, the Court held the rule to be general in its application to all indorsations whatever. The case is not reported.[v]

Does challenge affect onerous indorsees?

It must therefore be concluded, that drafts by a bankrupt upon his debtor in favour of a prior creditor, or indorsations to such creditor of accepted bills in the hands of the bankrupt, are, in the sense of the act of Parliament, assignations in security or payment, in preference to other creditors, and so reducible, if within sixty days of the bankruptcy. But though bills indorsed in this way be reducible in the person of the creditor to whom they have been indorsed, are they, or ought they to be so, in the hands of an

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[u] Campbell *a.* MacGibbon, &c., Fac. Coll. No 125, p. 230; Mor. 1139.

[v] Bell, II. 228. See p. 324, note P.

onerous and *bona fide* holder, to whom they may have been afterwards transferred? This question, which is not without difficulty, seems never to have come under the cognisance of the Court. To reduce an indorsed bill of this description, in the hands of a *bona fide* third party, into whose possession it had come for value, would certainly be inconsistent with the freedom and security of commercial dealings, and the acknowledged privilege of bills, of being in the hands of onerous holders, exempt from any latent exceptions. And, at the same time, nothing would be more easy than for the creditor to indorse away for value the bills he had thus received from the bankrupt, which would be a means of defeating the very purpose and spirit of the act. The creditors of the bankrupt might, no doubt, in all cases, have a claim against the original payee or indorsee for repetition; but, in the event of his failure, they would be deprived of this resource, further than ranking on his subject; and the funds thus disposed of by way of preference, being in the hands of third parties, would be irretrievably lost to the estate. For this, however, there seems to be no remedy; for I should be inclined to hold (though certainly with some diffidence), that a bill drawn or indorsed within the sixty days, is not reducible under the act in the person of an onerous and *bona fide* third party.[w]

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[w] A good deal of argument might be used on both sides of

If an indorsation to a bill have been given, not in security or payment of a prior debt, but partly

Case of Robertson v. Ogilvie.

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the question. Upon the one hand, it might be said, 1. That as the words of the act expressly declare all conveyances by the bankrupt, within the sixty days, in payment, &c., to be void and null, the radical vitiation thereby created cannot be done away by any subsequent transference,—what is void in its origin, cannot be rendered valid by any thing done to it afterwards. 2. That the general benefit to result from enforcing the statute, and preventing the undue alienation of the bankrupt's property to the prejudice of the body of his creditors, would greatly preponderate over the disadvantage to which it might occasionally expose individuals; and, at all events, a *bona fide* indorsee is not without remedy, for he may sue the indorser from whom he received the bill. But, on the other hand, in support of the opinion given in the text, may be urged, 1. The impolicy of checking commercial confidence, and diminishing the free currency of bills so necessary in trade. 2. The total impossibility, in many cases, of reducing documents of such rapid transmission as bills of exchange, in the hands of distant holders. 3. The peculiar hardship of making an innocent person, who must always be supposed to be unacquainted with the transactions of anterior holders, suffer for the acts of another. And, 4, That the analogy, in the present case, and that of bills for gaming-debts, does not hold; for, in the one, it is the accepter who challenges the bill as being given for an unlawful consideration, which rendered it void, *ab initio,* as to him. In the other, the creditors of the drawer or indorser must attempt the reduction; and it is not very easy to perceive how the accepter is to be stopped from making payment to the holder, or on what principle the latter is afterwards to be made to refund, to people he never heard of, the contents of a bill for which he had antecedently given full value to a totally distinct person.—A.

This point has not yet been decided. Though under the general rule, stated at p. 144, note [b], the indorsation would seem to be invalid, it is doubtful whether the rule is correctly applicable to questions under the act 1696. That act, like other ancient statutes, is expressed in very concise and general terms, which cannot be applied indiscriminately to every case that may be brought within their meaning, but which require to be so construed by the Court, as to meet the evil the statute was intended to prevent, without unnecessarily interfering with the rights of parties, who were nowise accessary to the fraudulent preference. The Court have, accordingly, exercised this discretionary power, by holding payments in the course of

for money advanced between the date of the indorsation and the bankruptcy, it will be sustained to the extent of the sum advanced.

The estate of Burnside was sequestrated on the 27th April, 1793, and Ogilvie appointed trustee for the creditors. Burnside was, at this time, in an account-current with Robertson.

| 1792. | Dr. | 1793. | Cr. |
|---|---|---|---|
| Dec. 10. To Robertson's acceptance without value, - - | L.400 | Mar. 9. By Archibald Muir's bill indorsed to Robertson | L.400 15 3 |
| 1793. Mar. 14. To cash, - - | 260 | April 15. By cash, | 197 12 0 |
| | | Balance due to Robertson, - - | 61 12 9 |
| | L.660 | | L.660 0 0 |

Ogilvie brought a reduction of the indorsation to Muir's bill on the act 1696. It was pleaded by Robertson, 1*st*, That the act did not apply to the indorsation in question; and, 2*dly*, That at least he ought to be allowed retention to the extent of the L.260 afterwards advanced by him. The plea, as to the first point, was repelled; but the compensation was sustained to the extent of L.260.[x]

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trade, by means of bills, as not struck at by the statute. In like manner, a *bona fide* indorsee from a creditor, who had received the bill by a challengeable indorsation, would probably be protected, on account of the injury to commerce which a contrary rule would occasion.—See Bell's Comm. II. 227.

[x] 1798, Robertson *a.* Ogilvie, trustee for Burnside's Creditors, Fac. Coll. No 91, p. 210; Mor. App. to Bill of Exchange, No 6.

Such creditors only are entitled, by the present law, to insist in a reduction of a partial preference, contrary to the act 1696, as were such at the date when the preference was granted. Man *v.* Walls, 25th July, 1702, Mor. 1006. Creditors are not en-

Renewing bills is challengeable.

Though bills could not be drawn or indorsed in security or payment within the statutory period, it was thought they might be granted as a mere voucher and acknowledgment of debt, which being simply an expeditious mode of constituting the creditor's claim without the expense of legal procedure, was not to be considered as a transference of, or bestowing any right over, the funds in preference to other creditors. Accordingly, a person having granted a new bill for the amount of one that had been protested, including the interest and charges, it was sustained in a competition with another creditor.[y] And, in another case, a person being debtor to his bankers in several bills which had been dishonoured, offered the bankers, in security, a vendition to a ship; which, however, they refused. On this, he applied to a gentleman, who agreed to interpose his security, by joining him in a promissory-note to them; and, in favour of this cautioner, he, on the same day, executed a vendition of the ship. Within three weeks of the transaction he became bankrupt; and an action having been brought by the trustees on his sequestrated estate, for setting

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titled to reduce preferences, the effect of which is only to change the creditor, without enlarging the funds of the bankrupt. Thus, if the bankrupt, within the sixty days, indorse to a creditor, in payment or security of his debt, a wind-bill which is in his possession, the preference thus created is unchallengeable, for its only effect is to make the party, who has to pay the bill, rank for its amount, instead of the creditor to whom it was indorsed. Bell's Comm. II. 219.

[y] 1762, Cowan *a.* Trustees of Mansfield, Dict. 3. 60. Fac. Coll. 74, 167; Mor. 1167.

aside the promissory-note granted by the bankrupt, and indorsed by the cautioner, the Court found, that the promissory-note did not fall under the statute.[z] But by subsequent decisions on an-

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[z] 1790, Swinton's Trustee *a.* Sir William Forbes & Co. Fac. Coll. No. 116, p. 220; Mor. 1181.—Dobie, after inhibition had been executed against him by Douglas, Heron, & Co., granted a bill to Brown, instead of one of a date long prior to that diligence, and which he then retired. On this new bill, Brown led an adjudication against Dobie's estate; in the ranking of whose creditors, Douglas, Heron, & Co. objected, that the bill in question having been affected by their inhibition, the diligence which followed was void. To which it was answered, that the bill did not constitute a new debt, being only a renewed document of an old one, against which the inhibition could not strike. The Lords repelled the objection.—1785, Douglas, Heron, & Co. *a.* Brown, Fac. Coll. No 223, p. 349. Mor. 7070.—A.

Though in Swinton's Trustees *v.* Sir William Forbes & Co., the Court sustained the promissory-note granted by Swinton, and Mr Campbell, as his cautioner, to the bank, the Lord Ordinary had reduced the vendition in security by Swinton to Campbell; thus finding, that an indirect preference over the debtor's property could not be obtained in this manner within the sixty days. The cautioner acquiesced in this judgment. Mr Bell mentions, that an opinion to the same effect has been delivered from the Bench in other cases, Comm. II. 238. In the last case on the point, however, the security was sustained. It is thus reported by Mr Bell, *ibid.*:—Monteith being indebted to the Duchess of Douglas in L.2500, her trustees agreed to supersede diligence against him, on his procuring security for L.1250. He applied to Mr Douglas and others, and they became bound for the L.1250; Monteith disponing to them in security, a house in Glasgow, worth L.500. Sasine was taken, and recorded, on this disposition, on the 17th October, 1785, and Monteith was made bankrupt on the 7th November, fifty-two days after the sasine. A reduction was brought on the act 1696. The Court first reduced the deed, but afterwards they supported it.

On the abstract question, some of the Judges thought the statute applicable; in which opinion they seem to have proceeded upon these grounds: 1. They allowed that in form, the debt, so far as the cautioner was concerned, was a new debt, since it was by his cautionary engagement that he first became debtor, and that in this view the statute did not apply; but, *2dly*, They said, that the act provides against indirect as well as

alogous points, the principle seems to be established, that a bankrupt cannot, in any respect,

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against direct securities; and this is plainly nothing else than an indirect security, and must be included. It was admitted, that a case might be supposed, of an indirect preference brought about by means of a security, which yet would not fall under the act; as where one borrows money, and with that money pays off prior creditors; for the lender has no concern with the application of the money. But where a man becomes cautioner, the natural question is, why cannot you as well give the security directly to the creditor, without my interposition? The answer is, "That may be struck at by the act, if the debtor be rendered bankrupt in sixty days; but this comes to the same thing in the main, and the act cannot trouble us." This is, in short, the very form of transaction which the law prohibits, under the description of an indirect security. These Judges, in short, considered a decision, which should exclude this case, as equal to a repeal of the statute.

The Judges who thought the act inapplicable to the case, seemed to rest their opinion upon the effect to commerce, and the injustice to cautioners, with which an opposite judgment must be attended. Bankers do not like heritable securities; they prefer good personal obligations. When they give a cash-account, and rejecting heritable security, desire personal, it is natural for the person getting the credit, to offer, to those who engage as his cautioners, that security which the banker rejects; so the affair is settled. But the cautioners die, and new ones are demanded; the new cautioners require heritable security, and it is given them. Why should this be more objectionable than the other? The thing happens every day: new cautioners come into cash-accounts, and new securities are granted. There may be cases where fraud can be proved, and, when proved, it authorises a reduction; but upon the general question, whether the act applies to reduce such a security as this, given on such an occasion, there can be no doubt. The act is against securities given to prior creditors for anterior debts; but this is not a security given to a prior creditor, directly or indirectly; no security is given over the debtor's estate; the creditor can avail himself nothing of the security given to the cautioner. That there is a defect, and possibility of evading that law, may be true; but that is for the legislature to consider, not for a court.

Such were the different opinions on the abstract question. But one Judge, of high respectability, moved a distinction, founded upon the facts of the case, as indicative of the total absence of fraud. To this, however, the other Judges would not

alter the situation of his creditors; that no deeds ought to be executed by him that may have that tendency; and that it would be dangerous to support any deed of that nature.[a] All deeds that may be a cover to fraud are struck at by the statute 1696. Bonds of corroboration, bills as documents of existing debts, and deeds of a similar description, may be instruments of fraud, by enabling a creditor to accelerate his diligence, and get the start of others. The debtor may act fraudulently in refusing them to one, while he grants them to another; nay, from its mere secrecy, the acknowledgment of a debt may be fraudulent; whereas a legal constitution by action being public, would have given intimation to the other creditors to take similar steps. In short, the purpose of the act is to avoid and preclude all questions of actual fraud in such cases, by establishing a rule, which, by its general application, may stifle fraud.

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agree. They held, that the act 1696 was made as a rule, to preclude the necessity of inquiry into fraud; and for this purpose, established a presumption of fraud, not to be got the better of by any proof. Although, therefore, in cases which do not fall under this presumptive rule, if fraud can be proved, it must annul the transaction; yet no proof of fairness can rescue those cases, which do fall within the description, from the penal effects of the statutory rule. Monteith's Trustees *v.* Douglas, 12th Dec. 1794.

On account of these contradictory authorities, this important question cannot be held as fixed.

[a] 1791, Creditors of MacKellar *a.* MacMath, Fac. Coll. No 170, p. 345; Mor. 1114, See the opinions of the Judges in this case, in Bell's Comm. II. 222-3.—1793, Creditors of Dunbar *a.* Grant, *ibid.* No 61, p. 133; Mor. 1027.

Date of indorsation and acceptance.

A bill or indorsation, to be liable to challenge, must be granted either after the granter's becoming bankrupt, or in the "space of sixty days of before;" and as the acceptance of bills payable after date, and indorsations, are seldom dated, it might be sometimes difficult to ascertain at what time the acceptance or indorsation was made. To obviate which, the Court, as has been already observed, seems to have sanctioned the doctrine, that an acceptance or indorsation, when not dated, is to be considered of the date of the bill; and, if it be dated, is to be held as of that date, till the contrary be proved.[c] It was observed on the Bench, in the case of the Thistle Bank *a.* Leny, 1794, where a dated indorsation, of the hand-writing of the indorsee, was objected to, that, by means of an indorsation, the act 1696 might be very easily evaded. But to this it was thought a sufficient answer, that the danger struck equally both ways; for if the consequence of repelling the objection was to give an easy method of evading the act, the sustaining of it might throw loose transactions settled by indorsation, not only during the period of sixty days, but even for years preceding the bankruptcy.[d] In all cases, however, it is in the power of the creditors to do away the legal presumption, of the acceptance or indorsement being of the

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[b] Ch. v. p. 137. Ch. ix. p. 236.

[c] Kennedy *a.* Arbuthnot. Rossie *a.* Ogilvie. Smith *a.* Home. Thistle Bank *a.* Leny.

[d] Ch. v. p. 137. Bell, II. 243.

date of the bill, by a contrary proof; and the examination of the bankrupt in sequestrations, together with the books of the parties, generally contributes to ascertain this point. As to the mode of computing the statutory period of sixty days, the rule appears to be this. The day or date of the bankruptcy is to be excluded, as descriptive of a period of time which is indivisible; and the sixty days preceding are descriptive of another and prior period, which is to be reckoned backwards, from the commencement of the day on which the bankruptcy happened.[e] An indorsation or draft, therefore, executed on any part of the sixtieth day preceding the day or date of the bankruptcy, will fall under the act.

Mode of computing the sixty days.

Frauds at common law.

Frauds, by which undue preferences may be created in contemplation of bankruptcy, if not expressly guarded against by the statute, or comprehended under its spirit, may be reduced at common law. Thus, Provan & Co. bought goods from Marshall to the value of L.236, and when called upon for the price, or bills at six months, which they had engaged for, they defended themselves, by setting off bills of Marshall's, indorsed to them by Hamilton & Co., to whom, in return, they had granted a bill for the amount of the indorsations. There was some doubt respecting the date of the sale. If posterior to the indorsation, then, as Provan & Co.

Marshall's trustee *v.* Provan & Co.

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[e] *i. e.* The day preceding the bankruptcy is counted the first in calculating the sixty days. See Bell's Comm. II. 184.

would have been creditors to Marshall at the date of the sale, and as Marshall was made bankrupt within sixty days, the sale would have been struck at as a security to Provan and Co. for a prior debt; and of this all the judges were clear. But if, on the other hand, the indorsation was posterior to the sale, then, although the case fell not under the statute, it was exposed to challenge as a device to give security to Hamilton & Co.; Provan & Co. getting right to their debt for the purpose of compensating or setting off the debt due by them against it. The Court gave judgment for the price of the goods, refusing to admit the compensation or set-off.[f]

Can drawer countermand payment?

In connexion with the present subject, it may not be improper briefly to notice some of the other points in the general doctrine of bankruptcy, by which bills, in common with other funds, may be affected. The enactments against fraudulent alienation and unfair preferences were made to prevent an undue distribution by the bankrupt of his undoubted property; but where the property is not indisputably vested in the bankrupt, as in the case of an uncompleted sale or bargain, and claims are advanced by third parties, questions of right will necessarily arise between them and the creditors, for the adjustment of which another set of rules must be adopted. To the completion of the sale of any

[f] 1794, Marshall's trustee *a.* Provan & Co. Fac. Coll. No 95, p. 212. Mor. 1144.

property, and to vest a right in the purchaser as proprietor, tradition or delivery, actual or constructive, is necessary. But after a sale of personal effects has been made, the seller may have good reason to become dubious of the buyer's circumstances, in which case he is allowed to seize and reclaim his goods in the way to their destination, and before a legal delivery of them has taken place. This is called stoppage *in transitu*. Under similar circumstances, is it possible to stop the payment of bills? A very usual way among merchants of settling for the price of goods, or satisfying a demand, is by a draft or order on a banker, or a bill drawn on a correspondent in favour of the creditor to whom payment is to be made. In such case, the acceptance of the order, as has been already remarked, is the completion of the transfer. Such draft or order, however, may frequently be given before the goods have been delivered to the drawer, or the equivalent and stipulated value received by him; and in the event of the failure of the person to whom the draft has been delivered without having paid value, the question might occur, whether, if the bill still remained in his hands, stoppage of payment might not be accomplished? Or, to take another view of the subject, suppose that I have, for the accommodation of a person holding bills at long dates, given him a draft on my banker in London; that, immediately thereafter, the accepters of the long-dated bills fail, and involve in their ruin

the payee of my draft, may I not stop payment of my draft at the banker's, or countermand my order on my own correspondent? Upon the same principle as that on which goods *in transitu* may be stopped by the seller, it would be difficult to assign a sufficient reason why payment of a bill of this description might not be prevented; for no third party being concerned, the privileges of bills are out of the question; and perhaps the same principle might apply to the indorsation of an accepted bill in the same circumstances, the indorsee failing without having paid value, and the bill continuing in his hands unindorsed.[g]

When property of bills held to pass.

Bills, too, indorsed and remitted to a factor for a specific purpose, or deposited for a special ap-

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[g] Bell, II. 142, 143, (2d ed.) But see I. 104, (3d ed.) where Mr Bell gives an opinion, that in the above cases it would not be competent to countermand payment of the bills. In the last edition no notice is taken of this point. If the drawer or indorser has been able, before the bill is presented for acceptance, to withdraw the funds from the drawee's hands, or should an acceptance be made without funds, it is thought that it would be competent, in an action against any of these parties, to plead against the holder, or the general body of his creditors, any defence arising out of the failure or insufficiency of the consideration, which was to have been given for the draft. But should the drawee have accepted the bill with value in his hands, or should he, when it is presented for acceptance, be possessed of funds, (to which the protested bill will be equivalent to an intimated assignation), it does not appear that, in a question with the holder's creditors, a countermand of payment can have any effect. By the acceptance or protest, the transference of the fund is completed; and there seems to be no authority for extending the doctrine of stoppage *in transitu*, to the conveyance of debts. An onerous indorsee, at all events, will not be affected by the countermand of payment.

propriation with a banker,[h] are not, in the event of the factor or banker's bankruptcy, to be confounded with his general property, which is to be divided among his creditors, but may be traced and redemanded by the owner, provided they can be got at before they are transferred to third parties, and before the money due upon them is received by the bankrupt, and blended with his common funds, so as to be undistinguishable from them. At least this has been found in England, where cases of this nature are more frequent; and it is to be presumed, that our courts would determine on the same grounds.

Case of Zink *v.* Walker.

Jenner was employed as an agent or banker, by Zink, who drew bills on him under an agreement to make remittances to answer the same when due. Jenner sent (Nov. 1776) an account current, including all the accepted bills running on him up to 30th November, amounting to L.1022, and making the balance due to himself L.1137. Zink sent first a bill for L.150, then one for L.300, and, on the same day on which they were sent, Jenner became bankrupt, without having paid any of the drafts, which Zink himself was obliged to retire. Zink owed Jenner on the bill account, commission, &c. L.195; and the bills for L.450 were, when they came to hand, deposited by Jenner's clerk, with Staples & Co., who wrote them short in Jenner's book. The plaintiff claimed his L.450, under deduction

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[h] Bell, I. 202. 207 *et seq.* (4th ed.)

of the L.195, &c. and the Court found him entitled to it. The bills were held to be merely deposited with Staples & Co. and to be in Jenner's hands as factor till paid, in the nature of goods unsold. Zink *versus* Walker, 2 Blackst. 1154.

Bills sent on a general account.

Where the intercourse between a merchant and a banker resolves into a general account, so as to render it impossible in their transactions to follow out any specific appropriation of bills deposited by the merchant, he must, in the event of the banker's failing in his debt, rank as a common creditor on the estate. But if such specific appropriation can be clearly made out as to any part of the bills or funds in the banker's hands, it may be presumed, that the doctrine above adverted to relative to depositation for special purposes, will so far apply.[1] There can be little

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[1] Many questions have occurred in England on the failure of bankers, regarding the right to bills indorsed to them either in full or blank, and put into their hands by their customers. As these cases will have much weight in the decision of similar cases in Scotland, it is proper to state some of the points which have been ascertained.

1. Bills placed in the hands of bankers for the purpose merely of receiving payment, remain the property of the customer. Bruce *v.* Hurley, 1 Stark. 24.

2. Bills sent to a banker or factor, by way of special appropriation for a particular purpose, do not pass to the banker or factor, but must be applied, on their failure, to the purpose for which they were intended; and this must also be done upon the owner becoming bankrupt. Bell's Comm. II. 120, 121. 124. Hassall *v.* Smithers, 12. Vesey, 119.

3. Bills remain the property of the customer, which are deposited with a banker as a security for advances on separate transactions. Thus, in Parke *v.* Eliason, 1 East's Rep. 544, long-dated bills were sent by Parke to Persent & Bodecker,

doubt, that where the bills deposited are negotiated by the banker with third parties, the original owner can have no claim to recover against

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he to be allowed to draw the amount without renewals, at two or three months. The bankers answered, that they had discounted the bills, and that short drafts would meet due honour. The bankers failed before payment of the short drafts. It was held, that had this been a simple case of discount, the bills would have passed to the bankers, but that in reality, though the word "discount" had been used, it was a case of deposite of the bills for a particular purpose, and the condition not having been complied with, the depositor was entitled to have them back.—In like manner, if a bank makes advances on the credit of bills deposited, the property does not pass, even though they have a power conferred on them to discount the bills on the amount being exhausted, unless they do actually discount. *Ex parte* Madison.—C. and T. Shaw established a bank at Southampton, and a correspondence with Staples & Co. in London. There was a special agreement that short bills remitted to Staples & Co. should not be discounted, unless Staples & Co. were overdrawn; then they might discount. Staples & Co., however, did not discount when overdrawn, but charged interest instead for the sums overdrawn. The short-dated bills were ordered to be delivered up to the assignees of Shaw & Co.;—12th Nov. 1796, cited by Lord Eldon in *ex parte* Pease and others, 1 Rose, 232. 19 Ves. 25. In such cases, however, the bankrupt estate must be indemnified against the outstanding acceptances made in reliance on the security. *Ex parte* Buchanan, 1 Rose, 280.

4. Bills expressly discounted with a banker become unquestionably his property; but it is sometimes difficult to say, when there is a running account between the banker and customer, whether a transaction is of the nature of a discount, or a mere deposite for the purpose of receiving payment. It appears that if the bills are written short in the account, they are to be regarded, till paid, as deposited only. Even if treated by the banker as cash, and as such the amount, deducting discount, placed to the customer's credit, it is not always that the property of the bill is held to have passed. "Entries in bankers' books," it was said in *ex parte* Pease, 1 Rose, 232, "not proved to have been communicated to the customer, are not evidence against, but may be for him." It must appear from the course of transactions, that bills lodged in the banker's hands in a similar manner, have been considered and treated as a payment of cash, and that the customer is at liberty to draw for the

such third parties.[k] And even where an express purpose of deposite was evinced, bills were found not recoverable by the owners, though they had been only transmitted in a general way to another house, the partners of which were also partners of the house of the depositaries.

Case of Bolton *v.* Puller.

Bills were put into the hands of Liverpool bankers for the purpose of their providing for the payment of other bills due at a house in London. The Liverpool bankers sent the bills to the London house on the general account between the

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amount. *Ex parte* Sargeant, 1 Rose, 153—Per Lord Chancellor Eldon. "It is quite clear that short bills, in the possession of bankers, are to be considered as still remaining in the possession of the parties, by their agents, to be specifically returned;" "that they were not written short amounts to nothing, unless there be a concurrence manifested at the time, or to be inferred from the habits of dealing between the parties, that they were to be considered as cash; if they were there with the petitioner's knowledge, as cash, and he drawing, or entitled to draw upon them, as having that credit in cash, he would thereby be precluded from recurring to them specifically; but it lies upon them to prove that to be the case, and petitioner is therefore entitled, unless they have been carried to his credit as cash, with his knowledge or consent." See Giles *v.* Perkins, 9 East, 12, where, in the circumstances of the case, the bills were held not to be transferred,—and Carstairs and others *v.* Bates, 3 Camp. 301, where it was held that they were, though there was no balance due to the bankers by the customer. Bell's Comm. II. 124. Chitty, 485.

5. Bankers are entitled to retain all bills in their hands, though not paid in for the purpose of being discounted, in security of their general balance against the customer, except such bills as have been specially appropriated to the benefit of a third person, and such bills or vouchers as have come casually into their hands, or on which they have refused to make advances. Bell's Comm. II. 124-5. Chitty, 482. Factors are entitled to a similar lien. Bell, II. 121.

[k] The *pledging* of bills by the banker will, in like manner, be effectual against him, to the extent of the sums for which they were impledged. Bell, *ibid.*

two houses. Both houses became bankrupt before the bills thus to be provided for fell due, and the depositor of the bills was obliged to pay his original acceptances. He claimed delivery of the deposited bills; and as he would clearly have been entitled to this, had they remained with the original depositaries, so would he as clearly have had no claim after the bills went into the hands of the London house, had there been no privity or connexion between the houses. The great doubt was, whether the partners of the London house, being partners of the Liverpool house, made such privity as to alter the latter rule; and the Court found it did not.[1]

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[1] Bolton *v.* Puller, &c. 15th June, 1796. 1. Bos. and Pul. 539.—Bell, I. 209.

By 52. Geo. III. ch. 63. (1812), it is enacted, "That if any person or persons, with whom (as banker or bankers, merchant or merchants, broker or brokers, &c.) any ordnance-debenture, exchequer-bill, &c. or *other bill*, &c. bank-receipt for payment of any loan, India bond or other bond, or any deed, *note*, or other security for money, or for any share or interest in any national stock, &c. or any power of attorney for the sale or transfer of any such stock or fund, or any share or interest therein, or any plate or jewels or other personal effects, shall have been deposited, or shall be or remain for safe custody, or upon or for any special purpose (without any authority, either general, special, conditional, or discretionary, to sell or pledge such debenture, &c. &c.) shall sell, negotiate, transfer, assign, pledge, embezzle, secrete, or in any manner apply to his or their own use or benefit, any such debenture, &c. &c. contrary to the purpose for which they were deposited, and with intent to defraud the owner or owners, every person so offending in any part of Great Britain or Ireland, shall be guilty of a misdemeanor, and be liable to transportation not exceeding fourteen years.

By § 8, it is provided, that the act shall not extend to restrain any banker, merchant, &c. from selling, negotiating, transferring, or otherwise disposing of any securities, property, or other effects in their custody or possession, upon which they

Bills taken by factor.

Where bills have been taken by a factor in his own name, for the price of goods sold for his constituent, the latter, in the case of the factor's failure, has a right to the bills,[m] even where the factor insures the debts, and is of course directly bound himself to the principal.[n] In the same manner, bills taken by an executor in his own name, for part of the executry effects, belong, not to his creditors, but to the next in kin of the deceased.

Case of Baird *v.* Murray's creditors.

Murray was executor to Sir James Rochead; and having taken the assistance of Gordon in recovering the estate, a balance was struck upon Gordon's intromissions,—a bill granted by him to Murray for L.286 payable to order,—and Gordon completely discharged. Murray died with this bill in his possession; and some of his creditors having attached it, the question arose, whether they or the next of kin of Sir James Rochead, had the preferable right to the bill. The Court found, "that there was sufficient evidence that the sum contained in Gordon's bill was part of the proceeds of Sir James Rochead's executry; and, therefore, that Sir

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shall have any lien, claim, or demand, which by law entitles them to sell or dispose thereof, unless such sale, transfer, or other disposal, shall extend to a greater number or a greater part of such securities, property, or other effects, than shall be requisite or necessary for the purpose of paying or satisfying such lien, claim, or demand.

[m] Bell, I. 202.

[n] *Ibid.* 203. In this case, however, the persons contracting with the factor in his own name, *bona fide*, are entitled to compensate the sum they owe by the factor's debt to them.—A.

James Rochead's next of kin are preferable for the sum in the said bill, before the other creditors of Murray."[o]

It has been stated, in general, that where bills are remitted to a factor for a specific purpose, and can be clearly traced in his hands, they are the property of the principal, and not of the factor's creditors. As illustrative of the particular and discriminative application of this doctrine, the following English case may be given :—

*Ex parte* Sayers.

Sayers, paymaster of the forces in the island of Dominica, wrote to Cheap & Co. of London, to purchase for him certain kinds of foreign coin, and enclosed for them bills upon the paymaster-general for L.16,000. For this amount, he desired them to give him credit, and he drew upon them for L.2000. Cheap & Co. discounted the bills; and not being able to procure the coin in England, they remitted L.5000 to Peter & Co. at Lisbon, with directions to purchase the coin wanted, or, if not to be procured, to return the money in good bills. They afterwards sent a similar sum, with the same directions. Not being able to procure the coin, Peter & Co. sent back the money in good bills, not indorsed by them; and Cheap & Co. having become bankrupts, those bills came into the hands of the assignees, and Sayers petitioned to have them de-

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[o] 1774, Sir John Baird *a.* Murray's creditors, Kam. Rem. Dec. No 51, p. 78. Dict. No 3, p. 149. Mor. 7737. See also Forbes *v.* Fonnereau, *sup.* p. 94.

livered up, as specifically his property. Lord Chancellor Loughborough, in deciding this case, proceeded upon the following grounds:—1*st*, That the money was sent for a particular purpose to Cheap & Co. 2*dly*, That the correspondence showed the remittance by them to Lisbon to have been made for the specific purpose of executing the trust, by making the purchase. 3*dly*, That if the coin had been returned, it would have been specifically the property of Sayers, and not a general debt, being purchased by his order with money remitted for the purpose. 4*thly*, That if Sayers had gone to Lisbon, he might have stopped the transaction, and taken bills instead of the coin ordered. 5*thly*, That the bills, when sent to London, might equally well have been taken by Sayers, had he been there; and, on the whole, that the right of Sayers to the bills should be allowed. His Lordship, at the same time, acknowledged the case to be difficult, and offered to take it for further consideration. The general ground of his decision was this, "that the money acquired an identity, and a distinction from the rest of the fund, by the application of it in sending it to Portugal."[p]

II.[q] The claims which may arise upon the

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[p] *Ex parte* Sayers, 5 Ves. jun. 169. Bell's Comm. I. 206.

[q] The remainder of chap. XII., as originally written by the author, has been omitted, and what follows is written by the editor. It appeared to him, that Mr Glen, whose observations

bankruptcy of obligants on bills of exchange, together with the modes of arranging the rights of parties in the case of cross-acceptances, will be considered under the following divisions:

1. The claim by an onerous holder.

2. The claims by the obligants *inter se*.

3. The effect of securities, by means of *compensation* or *retention*, on the rights of the parties.

4. The modes of ranking cross-accommodation acceptances.

When claim on bankrupt estate competent.

1. *The claim by an onerous holder.*—Every bill or promissory-note, on which action or diligence might have been validly raised against the parties, will warrant a claim in bankruptcy by an onerous holder. On the other hand, whenever the document of debt is liable to an objection, which, by the rules which have been stated in the previous parts of this work, would affect it in the hands of *bona fide* indorsees, and be a sufficient defence against an action at their instance, the claim of the holder upon the estate of any

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related only to the ranking of cross-acceptances, and contained little more than a commentary on the two Scots cases bearing on that subject, had not treated it so fully as its importance deserved; and that there were several collateral points of great moment, which fell naturally under this division, but which had been left altogether unnoticed. Instead of supplying these deficiencies by means of notes, which would have been quite disproportioned in length to the text, the editor thought it would be more useful to present a distinct view of the subject in the text, taking advantage of the materials which the author had made use of.

The discussions in the remainder of this chapter relate chiefly to cases of mercantile bankruptcy.

bankrupt party, entitled to plead the nullity, will be rejected. But should the objection strike against the document only, leaving the *debt* betwixt the parties untouched, a claim for the amount of the debt may be effectually entered.[r]

Against whom, and to what extent.

The sums for which the obligants on a bill are liable to the holder have been already considered.[s] The holder, provided the debt has not been diminished by partial payments, is entitled to rank on the estate of each obligant who is bankrupt, for its full amount, with interest and costs, and to receive a proportional dividend from each estate, till he has been paid 20s. in the pound.[t] But if, before a claim has been entered upon one of the estates, the debt has been diminished by a partial payment from any of the parties, or by a dividend paid, or even declared, by the bankrupt estate of another obligant, on which a claim had been previously made, it is held that the creditor must, in that case, limit his claim on the former estate, to the balance of the debt remaining due, after deducting the dividend or partial payment.[u] In the case of a company

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[r] Chitty, 438-9. Bell's Comm. I. 300, No 329.

[s] *Sup.* p. 268, *et seq.*

[t] Bayley, 355. Cooke, 164. *Ex parte* Wildman, 2 Ves. 113. *Ex parte* Rushforth, 10 Ves. 416.

By the bankrupt act 54 Geo. III. c. 137, § 49, it is declared, that in ranking creditors on a bankrupt estate, the principal, with interest up to the first deliverance on the petition for sequestration, shall be accumulated, and the creditor ranked to that amount, without counting interest after the first deliverance; but if there remains a surplus after the discharge of the whole debts, the creditors shall be entitled to apply it to discharge the farther arrear of interest.

[u] Bayley, 356, and cases there quoted. Bell's Comm. II. 290. Cooke, *ib.* *Ex parte* the Royal Bank of Scotland, 2 Rose, 197.

being an obligant on a bill, the whole debt may be ranked upon its bankrupt estate, and a claim entered on the estates of each of the individual partners for the balance unpaid from the company funds.[v]

Effect of no value.

The right of an onerous holder to rank is not affected by the circumstance, that the bill was granted, as to some of the parties, without value;[w] and though the holder may have paid no value for the bill, he is entitled to claim its full amount from the estate of a bankrupt obligant, if any of the indorsers posterior to that obligant has paid an onerous consideration.[x]

Claim on bill indorsed in security.

If, in security of a debt, a bill to a greater amount has been indorsed to the creditor, he may rank on the estates of all the parties, except his own indorser, for the full amount of the bill, provided he do not receive more than 20s. per pound on his debt;[y] and he is entitled so to rank, though he may, in the meantime, have received from the debtor part payment of the sum for which the bill was pledged;[z] or although the bill may have been, as to the other parties, an accommodation in the hands of his debtor. But in no case is the indorsee entitled to enter a claim against his own indorser to a greater amount than the value paid to the indorser, or the debt due by him. Thus, in *ex parte* Bloxham, Lord Chancellor Eldon said,—" I looked upon it as settled, that a credi-

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[v] Bell's Comm. II. 661-2.
[w] Chitty, 457.
[x] Chitty, 460. Bell's Comm. II. 361.
[y] Bell's Comm. *ib* Bayley, 357-8.
[z] *Ex parte* Crossly, 28th March 1791; Cooke, 168.

tor cannot hold the paper of his original debtor, a bankrupt, and prove beyond the actual debt upon it; but that such creditor may have the paper of third persons, who are debtors to such original debtor in more, and prove to the whole amount under the commission against them; and it is not material whether such third persons were indebted to the original debtor, for you cannot attach equities on bills of exchange."[a] If the sum, for which the bill has been deposited, be greater than its amount, the creditor may rank upon the estate of his own debtor for the whole sum of the debt, and upon those of the other obligants for the amount of the bill.[b]

Claim on bill not due.

The circumstance of a bill not being due, does not prevent the holder from claiming, it being declared by § 47 of the bankrupt statute, that "persons to whom the debtor is under obligation to pay money at a certain future time, shall be accounted creditors *de presenti* for the amount of the money, discounting the interest to the term of payment specified in the obligation, and may prove their debts in the same way as other creditors, and shall be entitled to their rateable dividend accordingly." It appears that the creditor in a future debt is also entitled (under the same deduction) to join in a petition for the sequestration of his debtor.[c]

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[a] 6 Ves. 449, as quoted by Chitty, 461. See also Bayley, 358. Cooke, 168.

[b] Bell's Comm. II. 123.

[c] Bell's Comm. II. 360-1.

Right of obligant paying bill.

2. *The claims of the obligants* inter se.—When an obligant in a bill makes payment of it to the holder, it is obvious that he has the same right as the holder to claim its amount from the prior parties, and to rank the debt on the estate of such of them as are bankrupt. In the ordinary case, the ultimate demand will be made against the accepter; but in the case of an accommodation-bill, the person accommodated is of course the party against whom the ultimate claim will lie.[d]

Double ranking excluded.

Let it be supposed, however, that one of the obligants is bankrupt, and that the holder claims and receives a dividend corresponding to the amount of the bill from his estate, and recovers the balance of the debt from a posterior party, the question occurs, whether the latter is entitled to claim on the bankrupt estate, for the sum so paid by him? It is clearly settled, both in England and Scotland, that such a claim is incompetent, in consequence of the fundamental rule in bankruptcy, that a double ranking for the same debt is not allowable. The justice of this principle is obvious: It is the right of each creditor, under the bankrupt laws, to receive a proportional share of the property of his insolvent debtor, equally with the others,—a rule which would be infringed, were a double dividend to be allotted to any one debt. It is equally evident, that a claim by the party paying the balance of the bill, in the case supposed,

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[d] Chitty, 195-6.

would be a second claim for part of a debt, the whole of which has been already ranked. The balance would have been lost by the holder, had this party not been bound for it; and he, on making payment, just comes into the holder's place as to so much of the original debt, and can have no better right to rank for it a second time than the original creditor would have had. And he cannot complain of this, because, had he never indorsed away the bill, but continued the holder, his loss would have been the same; or, if he had been called on to pay the bill before the bankruptcy, he could have ranked only once for its amount, which benefit he has received, by the holder having already ranked, and claimed from him only the balance. The authorities both of the Scots and English law are, accordingly, unanimous in the opinion, that a party, from whom the holder recovers the balance of a bill, after having drawn a dividend from the bankrupt estate of a prior party, cannot claim on that estate a second time for the sum paid by him.[f]

Right of obligant to claim as a contingent creditor.

Next, let it be supposed, that before the bill has become due, or before payment has been recovered by the holder from any of the parties, one of them becomes bankrupt; it is to be considered what is the right of the obligants, to whom the bankrupt is liable, (the holder not having entered a claim,) to rank on his estate

[f] Bell's Comm. I. 343. Opinions of Judges in Cowley *v.* Dunlop, 7 T. R. 565. Chitty, 442. Bayley, 353.

in security of their contingent loss, should they be afterwards called on to pay the bill to the holder. There is a striking difference between the laws of Scotland and England regarding the right of contingent creditors to claim in bankruptcy, of which it may be useful here to take notice.

Not permitted in England.

In England, a contingent debt, or a debt which arises subsequently to bankruptcy, is not permitted to be proved upon the estate of a bankrupt, a rule drawn from the common law of England, which afforded no mode of execution, whereby a debtor's property could be attached either in security or satisfaction of such debts. The same principle was applied to the commission of bankrupt, when introduced, which was a statute execution, intended to come in place of the ordinary execution.[g] The creditors, thus excluded from the distribution, are not, however, affected by the bankrupt's discharge, it being held, that the bankrupt's remaining still liable, and a creditor's not being able to prove his debt under the commission, are convertible terms.[h] Under the English law, therefore, it would not be competent for the obligants, in the case supposed above, to claim as contingent creditors, even though the holder has not claimed. Much of the hardship which obligants might suffer from this rule, has been removed by the statute

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[g] Bell's Comm. I. 245.

[h] Per Lord Kenyon, in Cowley *v.* Dunlop, 7 T. R. 565.

49 Geo. III. c. 121, § 8, by which they are enabled, on *paying* the debt, though after the issuing of the commission, to claim upon the bankrupt estate; and by this enactment, the operation of the bankrupt's certificate is also proportionably enlarged.[1]

Permitted in Scotland.

In Scotland, on the other hand, contingent or future creditors could always, at common law, affect by diligence the property of their debtor, in security of ultimate relief from their obligations; and since the first introduction of a statutory process for the equal distribution of a bankrupt's funds, the right of such creditors to rank on the estate, and to have a proportional dividend set apart for their use, has been acknowledged. By § 48 of the present bankrupt statute, the following regulations are established with regard to the ranking of contingent creditors. It is enacted, "that where a claim is entered by a creditor upon any obligation, the existence or amount of which depends upon a contingency, which is still unascertained at the period of lodging the claim, the trustee shall rank the claimant as if the condition were purified; but the dividend or sum which the claimant would be entitled in that case to draw, shall again be deposited in the bank or banking-house appointed by the creditors as before, or lent out on heritable security by the trustee, at the sight of the claimant, at such rate of interest as can be got for the

[1] Chitty, 454, 5, 470.

same; and the interest thereupon arising, shall belong to the creditors, and be included in the fund for their dividends, until the contingency upon which the obligation depends shall be declared, when the dividend so deposited shall belong to the claimant, or the other creditors, according to the terms of the obligation." Thus, by the Scots bankrupt law, an obligant on a bill will be entitled, in the case supposed, and if the holder has not already claimed, to rank on the estate of a prior bankrupt party, in security of his contingent debt against the bankrupt, should the claimant be afterwards obliged to pay the bill.[k]

No claim against bankrupt after discharge.

But the party called on to pay, will not, in either of the situations described, be permitted, according to the rules of the Scots bankrupt, law, to make any claim against the bankrupt after his discharge under the sequestration. By the discharge, the bankrupt is relieved of the whole debts contracted by him prior to his sequestration, under which are included debts, whether pure, future, or contingent; and by this no injustice is done to the posterior obligant, because, in consequence of the bill having been once ranked on the estate by the holder or himself, he is not a greater loser than any of the other creditors.[l]

Posterior parties have right to surplus dividends.

When, however, a dividend has been assigned

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[k] See as to a *cautioner's* right to claim in similar circumstances, Bell's Comm. I. 265.

[l] Bell's Comm. II. 479-80. 502-3. 695.

to the original holder's claim, greater than is necessary to answer the balance which remains due to him, after deducting partial payments from prior obligants, they will be entitled to draw the surplus;[m] and, in like manner, should a series of obligants have become bankrupt, and should the holder recover full payment from the estates of the posterior indorsers, before dividends have been declared from those of the prior parties, the former will be allowed to stand in the holder's place, and to draw the dividends assigned to his claim.[n] In apportioning these dividends among the different obligants, it seems consistent with equity (though there is no authority on this point), that they should be applied so as to repay the sums that have been drawn from each estate, in the order of the respective liabilities of the parties to each other.

Effect of compensation.

3. *The effect of securities by means of* compensation *or* retention *on the rights of the parties.* The nature and effect of *compensation* have been explained in a previous part of this work.[o] When a person is the holder of a bill, on which a bankrupt is an obligant, and the bankrupt is creditor of the holder in another debt,

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[m] See Cullen, 96. Chitty, 461.

[n] See the analogy of cautioners, Bell's Comm. I. 266, where it is so held, notwithstanding the difficulty, that had the cautioners themselves ranked, their claim could have been only for a *proportional part* of the debt. The rule is therefore applicable, *a fortiori*, to the case of the obligants on a bill.

[o] *Sup.* p. 249, *et seq.*

the two debts, so far as they meet, will by compensation extinguish each other, leaving the balance only, to be settled between the parties.

Effect of retention.

*Retention* may be considered a supplement to compensation, applicable where the mutual debts or obligations are not capable of compensating, from being illiquid, or not due, or of different natures; and it entitles a debtor to retain his debt, till the counter-debt or obligation on the part of his creditor shall be satisfied.[o] Retention differs, however, from compensation in this, that it cannot in general be pled, unless the party, demanding payment or performance, is bankrupt, or in suspicious circumstances.[p] By virtue either of compensation or retention, therefore, the holder of a bill is entitled to demand a balancing of accounts between himself and a bankrupt obligant, including every debt on either side, whether due or not, and to rank for the balance only.[q] The effect of these pleas, when they can be competently stated, obviously is, to disturb the equal distribution of the bankrupt's funds, and to give full payment to the creditor pleading the privilege, to the extent of the debt due by him to the bankrupt estate.

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[o] See Bell's Comm. II. 129. 132.

[p] Bell's Comm. *ib.*

[q] *Id. ib.* By the bankrupt act, the effect of compensation and retention are preserved entire to creditors, it being declared, § 46, that "in making up the said schemes of division, all debts claimed on, *which are entitled to a preference by the law of Scotland,* not altered by this act, shall be preferred accordingly." A similar reservation is contained in § 38.

Set-off in England.

In England, a right of compensation or set-off in bankruptcy is allowed by statutes 5 Geo. II. c. 30, § 28, and 46 Geo. III. c. 135, § 3, by which, in all cases where it shall appear there has been mutual credit or mutual debts between the bankrupt and any other person, one debt or demand may be set off against another, provided the credit was given to the bankrupt two months before the issuing of the commission, and provided the creditor was ignorant of any previous act of bankruptcy.[r]

Debt acquired after bankruptcy cannot be set off.

The debtor of a bankrupt will not, however, in either country, be allowed to set off a debt of the latter, acquired by him subsequently to the bankruptcy; for it would defraud the general body of creditors, were it in the power of an individual to secure a preference, by such an arrangement with a debtor to the bankrupt estate.[s] On the same principle, though it is held, that, while the parties are solvent, the creditor of a company may be answered by a plea of compensation on a debt due by him to an individual partner, on the ground of there being, in that case, an implied assignation to the company, of the partner's debt; yet, if any of the parties are bankrupt, or even insolvent, such an arrangement is not permitted. The following case is an example of the rule in both of the above situations :—

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[r] Bayley, 359, 360. Chitty, 473, *et seq.*

[s] Ersk. b. 3. t. 4. § 18. Bell's Comm. II. 135. Chitty, 479.

Case of Cauvin *v.* Robertson.

Dr Robertson rented a house belonging to Louis Cauvin, who was debtor by bill to a company, of which Dr Robertson was a partner. Cauvin died insolvent. The Doctor afterwards obtained an indorsation in his favour of the bill, and pleaded compensation of that debt against a claim for the rents of the house, made by Cauvin's heir *cum beneficio inventarii* (who was thus trustee for the creditors). "The Court seemed to be influenced by this consideration, that if the debtors of persons insolvent were to be permitted thus to avail themselves of assignations obtained from particular creditors, it would be easy to disappoint the remainder of them of that rateable and just payment of debt to which they are entitled." Compensation on the bill was therefore refused.[t]

It has accordingly, in England, been held incumbent on an indorsee, pleading as a set-off against his own debt, a bill accepted by the bankrupt, to prove that the indorsement was made before the bankruptcy.[u]

Can indorser retain as a *contingent* creditor?

The observations which have been hitherto made regarding the effect of compensation and retention, relate to the case of the bankrupt and the creditor being each, directly and primarily, the debtor and creditor of the other; and the law, as to such cases, seems to admit of no question. But

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[t] Cauvin *v.* Robertson, 18th June 1783, Mor. 2581. See also Marshall's trustee *v.* Provan & Co. *sup.* p. 336-7.

[u] Dickson *v.* Evans, 6 T. R. 57. The bankrupt here was a banker, and the debtor was not allowed to set off his cash-notes payable to bearer, unless he could prove he received them before the bankruptcy.

there is another situation in which the obligants on a bill may be, in relation to prior bankrupt parties, which requires a separate consideration. Suppose that a bill passes through the hands of various parties for value; that the accepter becomes bankrupt; and that the holder recovers payment in part, by ranking the bill on his estate, and receives the balance from one of the indorsers. It has been seen,[v] that the indorser cannot rank for this balance on the accepter's estate, because the whole debt has already received a dividend. But if the indorser be a *debtor* to the accepter in a separate debt, the question occurs, whether he is entitled, by the law of Scotland, to retain that debt as a security against the contingency of his being called on to pay the bill, and to apply it, when a claim is made, to indemnify himself for the sum to be paid to the holder?

In England, such a plea on the part of the indorser, is inadmissible. The statutes, which have been referred to, and which are now the sole foundations of the privilege of set-off in bankruptcy in that country, permit the application of it only in the case of debts and credits, which have accrued or were given *before* the bankruptcy, consistently with the rule, that no creditor, whose debt did not accrue before the bankruptcy, can prove under a commission.[w] In England.

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[v] *Sup.* p. 352.

[w] Chitty, 477. Though this rule is strictly applied to creditors pleading a *set off*, it has long been modified, when a right to *prove* only was claimed. Thus it was held, independently of

To this effect, is the decision in *ex parte* Hale.[x] In that case the petitioner had been the holder of a bill for L.200, accepted by the bankrupt, which he had indorsed away. The bankrupt, at the time of his bankruptcy, held a bill accepted by Hale for L. 90. After the bankruptcy, Hale took up the L. 200 bill, and now claimed to set off the L. 90, and prove only the residue. The Lord Chancellor said, "Pay the L. 90 you owe the estate, and prove the L. 200. I see no objection to that; but you cannot, by paying that bill, put yourself in a better situation than any other creditor. There was no mutual credit. There was a debt created upon the estate, and due at the time of the bankruptcy, but that debt was not due to you; therefore, in that respect, the set-off fails."

*Ex parte* Hale.

Indorser's right of retention in Scotland.

It may be doubted, whether this is the result which the law of Scotland should produce in similar circumstances. In Scotland, the application of retention is not limited within the same narrow bounds, as the plea of set-off is, in England, by express statute; nor are the rights of indorsers with us, affected by the principle of the English bankrupt law, that contingent and

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a statute, that an onerous indorser, taking up the bill after the issuing of the commission, might validly prove. Bayley, 340-1. The statute quoted *sup.* p. 354-5, admits, without exception, sureties and persons liable for debts of the bankrupt, who pay after the commission.

[x] 3 Ves. 304, 4th Feb. 1797.

[y] Had the claim of Hale been as a contingent creditor, before taking up the bill, still less, of course, would the set-off have been admitted.

future creditors have no right to claim on a bankrupt estate. Retention seems to be an equitable remedy entitling a party, who is under an obligation to another, to refuse payment or performance, till that other person satisfies any claims which the former holds against him. Thus, a person who held an *ex facie* absolute assignation to a bond, was found entitled to retention of it, in security of certain bills granted to him by the true owner, against the creditors of the latter. The same was decided in favour of the *ex facie* proprietor of a ship.[a] But creditors, contingently liable, are also entitled to this privilege. Thus, a person in whose favour an absolute conveyance of a house had been drawn out, was found entitled, on the bankruptcy of his constituent, to refuse to denude in favour of the trustee for the bankrupt's creditors, till relieved of two cautionary obligations, under which he had come for behoof the bankrupt.[b] In ano-

Nature of retention.

Cases.

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[z] Dougal *v.* Gordon, 17th Nov. 1795. Mor. 851.

[a] Balleny *v.* Raeburn & Co. 7th June 1808. Mor. App. to Compensation-Retention, No 5. In this case, the preference was challenged by the trustee on the bankrupt's sequestrated estate.

[b] Brough's creditors *v.* Jollie, 26th Nov. 1793. Mor. 2585. In this case, the law is thus stated, on the part of the creditor claiming retention:—"When a person is disabled by bankruptcy from discharging the obligations he owes to another, he cannot demand performance of what that other owes to him; and the solvent party is entitled to retain, for his security, any effects of the bankrupt he may have got into his possession, especially if he is cautioner for the bankrupt, because he is at all times entitled to insist on being relieved from his obligation, even though he has not been distressed for payment of the debt." This statement of the nature of retention is not denied, but tacitly admitted on the part of the general body of creditors, and

ther case it was held, that retention of a *debt* due by one to a creditor, for whom the debtor had become cautioner, was competent, in relief of the cautionary obligation, against an assignee to the debt.[c] The same was decided in a question between the cautioner and the creditor himself, though the cautioner was not distressed;[d] but afterwards, in a similar case, where distress was not alleged, the plea of retention was repelled.[e]

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These authorities seem to establish, that where a debtor is under an obligation, whether pure or contingent, for his creditor, he is entitled to retain his debt against the latter and his creditors, till relieved from the obligation; and that this privilege is peculiarly available in the case of the creditor's bankruptcy. Now, it is indisputable, that the indorser on a bill is a contingent creditor of the accepter; he is liable to be called on to pay the bill when due; and if he should be compelled to pay any part of it, he

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it was attempted to be shown that the plea was *inapplicable*, the right of retention being excluded by the law of mandate, under which Mr Jollie had purchased the house. It was pleaded,—" As Mr Jollie holds the 'subject merely as *mandatory* for Brough, he is bound to restore it free from all encumbrances, except those flowing directly from the commission under which he acted, such as the expense of management. That commission was precise in its terms, and limited in its object; and as it also implied exuberant confidence, *retention can no more be pleaded* in consequence of it, than it could against the *actio depositi*."

[c] Town of Aberdeen *v.* Strachan, 1st July 1709. Mor. 2570 and 2609.

[d] Granger *v.* Lord Lowdon, 7th Nov. 1632. Mor. 2546. See several other cases to the same effect in Morrison's Dict. tit. *Compensation—Retention*, § 6; also p. 2686.

[e] Cunningham *v.* Denniston, Jan. 1665. Mor. 2560.

will be entitled to reimbursement from the accepter. Though, in a question with the holder, all the obligants are equally responsible, yet in questions among themselves, an indorser is truly a surety for the accepter; gratuitously bound for his proper debt, (for though an indorser receive value from his indorsee, this only replaces the sum which he had formerly paid to his own indorser); and entitled to relief, as a surety, of any sum he may pay in extinction of their mutual obligation. If, then, while the parties are solvent, a demand were made against the indorser for payment of the bill, it is thought that the plea of retention on his part, till relieved from this claim, would be an effectual defence to an action by the accepter for the separate debt. But when the accepter has become bankrupt, so that it is almost certain the indorser will be called on for payment, the plea of retention seems to be of still greater force; and the analogy of a cautioner's right in a similar situation, and the general nature of retention, as received in the law of Scotland, appear to warrant the conclusion, that it should be available to the indorser.

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The circumstance of his being merely a contingent creditor against the fund in the hands of a trustee for the accepter's creditors, does not alter the case. It is true, that he cannot rank on the bankrupt estate, if the holder has already ranked; but this does not happen, because he is a contingent creditor, but because he is a creditor in that part of the original

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debt which would have been lost by the holder, had not the indorser been bound, and which cannot be admitted to a dividend, without breaking through the rule, that no debt can be allowed to rank twice. If the holder had not claimed, the indorser would have been entitled to do so, which shows clearly, that he is not excluded, as a contingent creditor, but as a creditor in a debt already proved. And accordingly, claims by creditors of that description are permitted and regulated by an express clause of the bankrupt statute. But it has been seen, that if the *holder* had been in a situation to plead compensation, he would have been secured in full payment of his debt. And if the *indorser*, the contingent creditor in that part of the debt which would be left unpaid, be possessed of a similar security, what ought to prevent him from making use of it, so as to bring about the same result? He is a creditor on the estate, and is only asking, what every creditor holding a security is entitled to, that so far as his security goes, he shall be allowed by its means to protect himself from loss. Farther, in England, contingent creditors are excluded from claiming on a bankrupt estate, and their remedy against the bankrupt is left entire, notwithstanding his certificate. But in Scotland, the whole claims and rights of contingent creditors against the bankrupt, are at issue under the sequestration, and are cut off by the discharge. If, then, the indorser was entitled to plead retention, in the

case supposed, before the sequestration, the necessity of his being allowed to do so under the sequestration is still greater. And as this privilege is not taken away by the bankrupt statute, but, on the contrary, an express reservation is made in favour of debts entitled to a preference by the law of Scotland, there seems to be no reason why effect should not be given to the indorser's plea, in the distribution of the accepter's funds.[f]

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[f] The Editor is happy to be able to quote the opinion of Mr Bell, in support of the explanation given in the text, both of the extent of the right of retention in general, and of its application to the case of the indorser on a bill, indebted to the accepter.

In treating of the right of retention competent to a cautioner, he observes, Comm. II. 128, "Where a person indebted to another, engages as his cautioner or guarantee, it is presumed he has done so on the faith of the security which the retention of his debt will afford him; and on this principle, a lien is given him on his debt for relief. The same principle may give retention of goods pledged, but not of goods in the cautioner's hands for manufacture, &c. But although the principle now pointed out seems to have been the original ground of retention on the part of the cautioner, his right has come gradually to be extended to a general lien or retention over all debts due to the person for whom the cautioner has bound himself, although posterior to the engagement as cautioner.

"There is a remarkable distinction between the English and Scottish laws, which must be attended to in all questions of this kind, either where the case involves a *conflictus legum*, or where the analogy of the English cases is resorted to in the illustration of a Scottish argument. In England, contingent debts do not rank upon a bankrupt estate; in Scotland they do. In England, therefore, there can be no set-off, or lien, on account of debts which have not fallen due prior to the commission of bankruptcy; or, at least, which are not payable, at all events, on a day certain. In Scotland, a creditor is entitled to proceed with diligence for attaching funds to secure to himself an eventual debt, or relief of a demand that may eventually be made upon him; and, under a sequestration, he is entitled to have a dividend set apart for him. If the case, then, be supposed of a

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If it could be held as established, that, by the law of Scotland, an indorser may retain a debt due by him to the bankrupt estate of an accepter, in security of the sum he may be called on to pay to the bill-holder, it would follow, that he has a similar right, on the bankruptcy of the drawer, or any of the prior parties. His contingent claim against each of these parties, is of the same nature with that against the accepter, and there seems to be no reason to doubt, that any privilege which he is entitled to in the one case, will be equally available to him in the other.

Plea repelled in House of Lords.

The application of retention to the contingent claims of indorsers against the prior parties on a bill, has been discussed at length, because in the case of Curtis *v.* Chippendale, the plea of retention by an onerous indorser, in these circumstances, after being sustained by the Court of

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bankruptcy, where the bankrupt stands guarantee for a creditor, the bankrupt estate will, according to the Scottish law, be entitled to retention against such creditor claiming on the fund, till relieved from the guarantee. In England, the person giving the guarantee will not be so entitled."

In a subsequent passage, p. 135, where he illustrates the doctrine, that "the debt and credit must mutually exist between the parties before bankruptcy," Mr Bell seems to have had in view the very case supposed in the text. It is observed, "If the claimant be a party, before bankruptcy, to a bill or other obligation, which is not due till after the bankruptcy of the person who is the proper debtor, he may plead compensation, or insist for an account after bankruptcy; *and this whether the obligation be absolute or contingent.* In England, this is held with some limitation. Thus, one who had indorsed the bankrupt's note, and afterwards retired it, was not allowed an account, he having retired the note after bankruptcy. In Scotland, *not only future and unconditional, but also contingent debts, are admitted in bankruptcy.*"

Session, was repelled in the house of Lords; and if the principle of that decision shall be persevered in, the right of retention by indorsers, who have not actually taken up the bill before the bankruptcy of a posterior obligant, may be considered as put an end to. The circumstances of the case were as follow:—

Case of Curtis v. Chippendale.

M'Alpine & Co. of Scotland delivered accommodation-bills to a great amount, on which they appeared as the drawers, to Livesay, Hargrave, & Co. of London. They also delivered to them good bills to a considerable amount, which were duly paid. M'Alpine & Co. received, in return, from Livesay, Hargrave, & Co., bills drawn by the latter upon, and accepted by, Gibson & Johnson, bankers in London. A transaction, exactly similar, took place between M'Alpine & Co., and Lewis & Potter of London. The good bills delivered by M'Alpine & Co. to these houses, amounted nearly to the value of Gibson & Johnson's acceptances, so that M'Alpine & Co. were *onerous indorsees.*[h] They indorsed these bills to various persons for value. Livesay, Hargrave, & Co., and Lewis & Potter, indorsed to Gibson & Johnson, many of the accommoda-

[h] The fact, that M'Alpine and Co. were onerous indorsees, is not stated distinctly in the report of the case in the Faculty Collection, but it is indisputable. Not only is it uniformly asserted in the pleadings by their trustee, (see Mem. p. 4 & 5 in Adv. Lib. and respondent's appeal case, p. 2), but, in the appendix to the former paper, a list is given of the bills which were duly paid to Livesay & Co. The fact is not questioned by the other party, and the *argument* on both sides assumes it.

tion-bills, on which M'Alpine & Co. were obligants, and the bankers, being greatly in advance for these houses, were thus *onerous holders* of the bills so indorsed to them. In this situation, the whole four houses became bankrupt. The holders of Gibson & Johnson's acceptances, indorsed by M'Alpine & Co., claimed on the estates both of Gibson & Johnson, and of M'Alpine & Co.; and the assignees of Gibson and Johnson made a claim on the latter estate for the amount of the bills in their hands, on which M'Alpine & Co. were obligants. The question for decision was, whether the trustee for the creditors of M'Alpine & Co. could retain the dividends due to the assignees, till the estate was relieved of the dividends, which would be paid to the holders of Gibson & Johnson's acceptances.

Situation of parties.

The respective situations of the two parties were as follows:—M'Alpine & Co. were onerous indorsers on bills, of which Gibson & Johnson were the accepters, and which the latter, in a question with the former, were unquestionably bound to provide for. Whatever sum, therefore, might be paid by M'Alpine & Co. to the holders of these bills, would be in extinction of the proper debt of Gibson & Johnson, and to that extent the former were the contingent creditors of the latter. On the other hand, Gibson & Johnson were the onerous holders of bills on which M'Alpine & Co. were obligants, and were creditors of M'Alpine & Co. to the amount of these bills. The estate of the latter was thus the con-

tingent *creditor* of the estate of Gibson & Johnson, for the dividends to be paid on the acceptances of Gibson & Johnson; and its *debtor*, in the dividends on the bills on which M'Alpine & Co. were obligants, and which had been indorsed to Gibson and Johnson.

Decision.

After a very deliberate consideration of the case, a majority of the Court of Session were of opinion, "that as Gibson & Johnson were claiming to be ranked on the effects of Scots bankrupts situated in this country, their right must be determined by the law and practice of Scotland, in which no principle is better established, than that a person may plead retention, till the creditor claiming a debt of any sort from him, relieve him of all obligations for which that creditor is primarily liable." In the House of Lords, however, it was ordered and adjudged, "that the several interlocutors complained of be reversed; and it is farther ordered, that the said cause be remitted back to the Court of Session in Scotland, to rank the appellants pursuant to their claim, to the amount of L.25,801 : 4 : 10, and to proceed further in the cause, according to justice."[i]

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[i] Curtis and others, assignees of Gibson & Johnson, *v.* Chippendale, trustee on the sequestrated estate of M'Alpine & Co., 9th Dec. 1794; reversed in House of Lords, 23d Feb. 1797; Mor. 2589. The main argument in the appellant's case in the House of Lords, is, in substance, that as it is declared by the sequestration statute, that the whole estate of the bankrupt shall be a fund of division among the creditors prior to the date of the application, and *none else*, the law of Scotland is similar to that of England in the exclusion of future creditors in bankruptcy; that supposing retention to have been originally competent, it was

Effect of this decision.

The House of Lords have thus determined, that an indorser of a bill is not entitled to retain a debt due by him to the bankrupt estate of the accepter, in security of his contingent claim, should he be afterwards called on to pay any part of the bill; and from the principle of the decision (if finally adopted into the law of Scotland), it may be deduced, that no indorser is entitled

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thus taken away, because, where there was no claim against the estate, there could be no room for compensation or set-off; that if M'Alpine & Co.'s estate should pay dividends on Gibson & Johnson's acceptances, these could not be ranked for, because the debt arose after bankruptcy; and neither could the trustee set off a debt due by him to Gibson & Johnson's estate against these dividends, because, though as individuals, Gibson & Johnson might be liable for them, their assignees were not.

In answer to this argument, it has been attempted to be shown in the text, that an indorser is a creditor against the accepter's estate, notwithstanding the contingency of his debt; and that the right of retention, which is much more extensive in its operation than the privilege of set-off in England, is preserved to him by the bankrupt statute.

Another argument, which was maintained both in the Court of Session and House of Lords, was, that allowing retention would cause a double ranking on Gibson & Johnson's funds for the same debt. This is no farther true than in every case of a security, the necessary effect of which is, to give full payment to a particular debt.

The Editor is aware, that Mr Bell has not drawn the same conclusion from this decision with that contained in the text, but it appears to him that the observations of Mr Bell proceed on the erroneous supposition, that M'Alpine & Co. had given no other consideration than their own paper for Gibson & Johnson's acceptances. That this is a mistake, has been already shown; and it may be farther noticed to the same effect, that the argument of the parties proceeds on the supposition of M'Alpine & Co. being onerous indorsers. Gibson & Johnson were gratuitous accepters, and if M'Alpine & Co. had been gratuitous indorsers, they could have had no pretence for a claim of retention, as they would have been themselves the proper parties to provide for the bills. The plea of the assignees was, that admitting them to have been onerous indorsers, still retention was incompetent. See Bell's Comm. I. 345-6.

to retention of a debt due by him to a prior bankrupt obligant, unless he shall have taken up the bill before the bankruptcy.

Ranking of cross-paper.

4. *The modes of ranking cross-accommodation acceptances.*—When two persons make an exchange of their mutual acceptances, without value, it is unquestionable, if one or both become bankrupt, that the bills, remaining in the hands of the original parties, are altogether unavailable, and that they must be destroyed or delivered up.[k] But if one of the parties have indorsed for value the acceptance which he had received, and so have given occasion to a claim, on the part of the indorsee, against the accommodation-accepter, it is a more difficult point, whether this validates the counter-acceptance in the hands of the latter, and entitles him to enter a claim for it on the bankrupt estate of the other party. As there has been only one decision in Scotland upon this subject, it is necessary, in illustration of it, to have recourse to the authorities of the law of England.

Counter bill must be taken up.

If the party have paid up to the indorsee the *whole amount* of his own acceptance, it is held that there is no impediment to his proving the sum so paid, on the estate of the bankrupt;[l] and it appears, that the claim may be founded, either upon the sum paid to the indorsee, or upon the

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[k] Bell's Comm. I. 344.

[l] *Ex parte* Maydwell; Cooke, 157. Buckler *v.* Buttivant, 3 East, 72.

counter-acceptance.[m] But till the party pay the *whole* of his own acceptance, though he may claim on the bankrupt estate, he is not allowed to draw any dividend in virtue of the counter one; nor is he permitted, if the indorsee have already claimed, and drawn a dividend, to rank for the balance, on his being called on to pay it.[n] This doctrine, though *in effect* clearly adopted in the English Courts, is, however, subject to an apparent difficulty, on account of a peculiarity which it is necessary to explain.

Decisions by courts of *law* in England.

We have seen,[o] that by a rule of the English law, debts arising after bankruptcy are excluded from a dividend, but that the creditor's remedy against the bankrupt is not affected by his certificate or discharge. By a strict application of this rule to the above circumstances, it would follow, that the accommodation-accepter is not a creditor of the bankrupt, till he takes up his own bill; and if this be not done by him till after the bankruptcy, that he may proceed against the bankrupt, upon the counter-acceptance, notwithstanding his certificate. When such an action, however, has been brought against a bankrupt, the courts of *law* have uniformly denied this consequence, where there was reason to suppose, from the facts of the case, that the parties in-

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[m] Chitty, 444.

[n] Bayley, 349, 352-3. Chitty, 443, 5. Cooke, 162; and cases cited by these authors.

[o] *Sup. p.* 354.

tended the bills as considerations for each other; and have laid down the principle, that in such circumstances the counter-bill "was not given as an indemnity, which was in its nature conditional, but created an absolute debt from the beginning, which was capable of being proved under the commission, and being so proveable, was necessarily barred by the certificate."[p] But it is only in the courts of law that this doctrine is received, to the effect of enlarging the operations of the bankrupt's certificate. In the distribution of the bankrupt estate, under the jurisdiction of the Lord Chancellor, the rule already laid down is unquestionably fixed;[q] and in a case, where the point for decision was, whether a commission of bankruptcy was valid, for which the holder of such a counter-acceptance had been the petitioning creditor, it was stated from the bench, that "this debt, though not contingent on the face of the instrument, is thus far in its nature contingent, that until the party taking the bankrupt's acceptance have paid his counter-bill, the Court of Chancery will restrain him from receiving any dividend; and it would be a singular construction of the statutes, that a man,

By Court of *Chancery.*

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[p] Rolfe *v.* Caslon, 2 H. Bl. 570. Cowley, *v.* Dunlop, 7 T. R. 565. Buckler *v.* Buttivant, *sup.* Bayley, 344-5.

[q] See *sup.* note [n]. It appears that the only doubt is, whether the accommodation-accepter is not to be allowed even to *prove*, till he take up his own paper, or whether he is to be permitted to prove, but the dividends to be suspended till he do so. Cooke, 174, states that a proof is not competent; Montague, i. 139, that the dividends are suspended.

who will not be entitled to receive a shilling out of the bankrupt's estate, unless he take up his own acceptance, should be able to petition for a commission. And no case being cited to show that he can, the Court upon principle think the debt not sufficient to support the commission."[r]

Foundation of doctrine.

This doctrine is founded on the rule formerly noticed, that a double ranking for the same debt on a bankrupt estate cannot be permitted. No real debt exists between the parties in virtue of the exchanged bills. Both bills are equally invalid in their hands as being gratuitous, but both have the capacity of being rendered available, by an indorsation for value to a third person. If one of the parties, whose acceptance has been so indorsed, be compelled to pay any part of it, he is entitled to relief against the other for what he pays, of which claim of relief the counter-bill may, while the parties are solvent, be regarded as the constitution, and it might be sustained as a valid warrant for a charge against the accepter to the extent of the sum paid. But in bankruptcy, the creditors are entitled to look beyond the mere voucher, into the real nature of every debt founded on, which is obviously, in this case, just the party's claim of reimbursement for the sum he has paid on his own bill. But if the indorsee has ranked, or may rank for the same debt, a second claim by the

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[r] Sarratt and another, *v.* Austin, 4. Taunt. 200.

holder of the counter bill, in relief of the balance, is inadmissible. To this effect was the decision of the Lord Chancellor in the following English case:

Case of *ex parte* Walker.

Caldwell & Co. and the Brownes, had, for several years, been engaged with each other in very extensive accommodation transactions. In 1793, both became bankrupt, and on making up a statement of their dealings, it appeared, that on an account of the *real* transactions between them, there was a balance in favour of Caldwell & Co. of L.40,716; that the Brownes had negotiated accommodation-bills of Caldwell & Co. to the amount of L.196,589 : 6 : 4; Caldwell & Co., those of the Brownes, to the amount of L.126,855, 11s. 10d.; and that Caldwell & Co. had still in their hands, unnegotiated, other accommodation-bills of the Browns, to the amount of L.178,294, 8s. The estate of Caldwell & Co. being thus proved upon to a much greater amount in proportion, than that of the Brownes, the assignees petitioned to be allowed to prove against the latter, the bills still in their hands, so as to be reimbursed of the difference. But the Lord Chancellor said, " till Caldwell & Co. pay all the creditors of Brownes, who are likewise creditors of theirs, 20s. in the pound, they would be, by proving, sharing with the creditors of Browne, who are likewise creditors of theirs. If I allow this petition, I must do two things that are quite impossible. I must hold that the bankruptcy creates a debt which did not exist antecedently,

and I must hold that the same debt may be proved twice."[s]

Case of Nairne *v.* Cranstoun.

The Court of Session have, however, in the only case of this description which has occurred in Scotland, permitted a claim on the estate of the bankrupt indorser by the holder of his counter-acceptance, though a claim was at the same time made by the indorsee. The following are the particulars of the case :[t]—" Laidlaw accepted bills drawn by Forrester & Co., to the amount of L.831, and, on the other hand, they at the same time granted promissory-notes to Laidlaw for about the same amount. Forrester & Co. indorsed Laidlaw's bills, and received their value; but Laidlaw kept Forrester & Co.'s notes in his possession,—and both failed. The holders of Laidlaw's bills drew 10s. in the pound from his estate. They also ranked for the amount on

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[s] *Ex parte* Walker, 4 Ves. 373. The cash-balance was, however, allowed to be ranked. Mr Christian, B. L. II. 388-9, objects to this, and apparently with reason. The balance must have been the consideration of bills to that amount, delivered by the Brownes to Caldwell & Co., and these bills having been indorsed by the latter for value, were ranked on the Brownes' estate, so that both the bills, and the consideration paid for them, were thus ranked. In a subsequent case, *ex parte* Metcalfe, 11 Ves. 404, where there was a balance in favour of Palmer, on his transactions with Williamson, of L.498, but the latter had given the former bad bills to the amount of L.1098, which were in the hands of indorsees, Lord Eldon allowed the balance to be proved against Williamson's estate, but the dividends to be retained, to answer what might be drawn by the indorsees of the bills.

[t] The narrative of this case, with the comments on it by Mr Bell (in which the Editor entirely concurs), are given, as inserted by the author in the first edition.

Forrester & Co.'s estate, from which it was supposed they would draw 5s. more. The trustee for Laidlaw's creditors having claimed to be ranked on Forrester & Co.'s estate for the promissory-notes granted by them to Laidlaw, and still in his hands, the claim was objected to, on the footing that these promissory-notes did not create a debt against Forrester & Co., distinct from that due by them in consequence of the accommodation-bills, which they received from Laidlaw, and got discounted. These bills were the only value which they received for granting them; and had Forrester & Co. paid them, Laidlaw would have had no claim for the notes. These promissory-notes, therefore, were to be considered in no other light, than as a security put into Laidlaw's hands by Forrester & Co., in relief of the obligation which he had undertaken, by accepting the accommodation-bills. And as these bills were already ranked on Forrester & Co.'s estate, the trustee was entitled to plead compensation or retention against the claim made by Laidlaw's creditors; for, to sustain the claim, would be to allow both the creditor and cautioner of the debtor to rank for the same debt. The Court repelled the objection, and allowed Laidlaw's trustee to be ranked for the full sum in the bills.[u]

Remarks by Mr Bell.

"On this judgment the following observations have been made. It is difficult not to acknow-

[u] 1796, Nairne *a.* Cranstoun, Fac. Coll. No 213, p. 502. Mor. 2597.

ledge, 1. That to allow Laidlaw's claim, without supporting the plea of retention, was just to allow a double ranking on Forrester's estate for the same debt, since the one set of bills had already ranked on that estate, and the other set of bills was in Laidlaw's hands merely as an indemnity. And, 2. That the only effect of such retention would have been nearly or precisely the same with what takes place in England, where the dividend for ranking on cross-paper by a nominal creditor, though in reality only a surety, is suspended till it should be seen what the surety actually pays, and how far he exonerates the estate from his own paper. It was urged, that the estate of Forrester & Co., who had discounted the bills, was benefited to the full amount of 20s. *per* pound by that discount, of which the holders of these bills only got back from it 5s. in the pound; so that, even after Laidlaw's creditors ranked upon Forrester's estate for the promissory-notes, and got other 5s., it would in fact be only 10s. in the pound; whereas the holders of the bills accepted by Laidlaw, having drawn 10s. in the pound of their amount from his estate, it is obvious that his creditors would lose, at all events, a sum equal to 5s. in the pound on these bills; and were the objection to be sustained, they would lose precisely the 10s. which had been paid them out of his estate. The conclusion deduced was, that even the refusal of retention left the estate of the discounter still highly benefited, while the holder of the cross-paper was not re-

imbursed. But is there not reason to question this view? It would indeed be quite correct, if both parties were solvent; but in bankruptcy, it will be remembered, that every personal creditor is to be held as having equally benefited the bankrupt's estate to the amount of 20s. *per* pound, while yet he has drawn no larger a dividend, and is in the very condition with the creditors in the discounted bills. But how should the mere circumstance of more than one party being engaged with the latter, give a double advantage, without transgressing the plain rule, that no one debt can rank more than once? Another view that weighed much with the Court was, that in such cases, the object should be, to preserve, if possible, equality between the parties. This principle is entitled to every regard between solvent parties to a contract; but bankruptcy reduces all personal creditors to a level; and, laying aside all views of hardship, and all chance differences of the value of obligations, requires a court of law to apply, without reluctance or exception, the same rules to all cases, viz. that no debt is to be ranked for more than once; and that no two parties are to be ranked at once for the same debt. It is no longer the one of the original parties that contends with the other, but the creditors of the one with the creditors of the other; each being entitled to claim the whole personal funds of their debtor, and to exclude double ranking for the same sum."[v]

[v] Bell, II. 422. (2d ed.)

When both parties have indorsed the acceptances.

If both parties have indorsed the acceptances in their hands for value, and are bankrupt, the holders will be entitled to rank on the estate of each to the full amount of the bills, and neither estate will be entitled to claim from the other any excess of dividends which it may have paid.[w] This would be a claim of relief of part of a debt, which had already been ranked to its full amount; in bankruptcy, the dividend must be taken as full payment of the debts of the bankrupt.[x] But if one party be solvent, and the bankrupt estate of the other have paid more than its just proportion, the latter may, of course, claim the difference from the former.

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[w] Bell's Comm. I. 345.
[x] *Id.* 346, *ex parte* Walker, *sup.*

# CHAP. XIII.

## OF LETTERS OF CREDIT.

Origin and nature of letters of credit.

LETTERS of credit bear a close affinity to bills of exchange, and owe their origin to the same cause, viz. the difficulty and danger attending the transmission of cash to foreign parts, or to any considerable distance in the same country. A letter of credit, properly so called, is a mandate or order from a person in one place, to his banker or correspondent in another, authorising him to advance to a third person mentioned in the letter, sums of money to a specified or unlimited extent; for which advances, he who gives the letter becomes responsible. No person of ordinary prudence (unless he means to bestow the money by way of gift) will grant a letter of this description, without being pretty well assured of reimbursement for the sums which he thus allows to be advanced on his credit, especially as an unrestricted credit may, in many cases, be abused. To guard against accidents, such as the bearer losing the letter, or being robbed on the way, Savary recommends it as a necessary and proper

precaution to describe minutely the person and appearance of him to whom the letter is given.

Letters of guarantee.

But another species of letters of credit has grown into practice among merchants. A person, from being unknown in a particular place, or from his responsibility being doubted, may find it difficult to purchase goods upon his own credit; in which case he gives a reference to some house by which he is better known, or obtains from a friend a letter, certifying that he is in good circumstances and worthy of credit, and engaging to see paid the debts which he contracts. This, strictly speaking, is more a letter of guarantee than a proper letter of credit; but the term is now indiscrimately applied to both. In letters of credit, strictly so called, he who advances the money has a direct claim against the writer of the letter for the money so advanced.[a] But in letters of guarantee for the price of goods furnished, the writer of the letter is only eventually and subsidiarily liable, should the party to whom the goods are delivered be found unable to pay the price, which renders it necessary that he be discussed before any claim can be made against the guarantee.[b]

Extent of claim by holder.

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[a] It appears, that, as in bills of exchange, he has a claim against that person only, and not against the receiver of the money. Bell's Comm. I. 284.

[b] Boucher describes another sort of letters of credit, which he calls commercial mandates. A commercial mandate is a letter by which a mercantile house orders another house in the same city to pay, within a limited time, to the bearer, a certain sum specified in the letter. These commercial mandates seem to be

Letters of credit, like bills, being extremely useful in commerce, have been indulged with similar privileges. They are obligatory and probative against the granter without witnesses, and whether holograph or not; as are all missive letters *in re mercatoria*.[c]

Their form.

In the first cases that occurred in this country, relative to proper letters of credit, it was thought, that, in order to make merchants liable for their letters, regular notification of the advance was necessary, in the same manner as in the negotiation of a bill;[d] for which three reasons were assigned: 1*st*, That the writer of the letter might know that credit was given; 2*dly*, That he might know how much was given; and, 3*dly*, That he might know whether or not the holder of the

Notice of furnishings not necessary.

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synonimous with our inland drafts or orders, differing somewhat in their form, but regulated nearly by the same laws. They are strongly praised and recommended by Boucher, as by their means a creditor, suspicious of his debtor's circumstances, derives, from his acceptance of the order, a security which he could not directly demand, without doing some injury to the debtor's credit: and a debtor, who wishes to protract or evade payment, is thus brought at once to the test, without any apparent severity on the part of the creditor; for the debtor cannot refuse acceptance, without exposing himself to judicial diligence, which might otherwise have appeared harsh on the part of the creditor, but is now the just punishment of dishonouring his order. N. 1551.—*Vide* ch. iv. p. 125–8.—A.

[c] 1739, Goodlet Campbell *a.* Lennox. Mor. 8222.—1779, Clark *a.* Ross, Dict. v. 4. 412.—See also, 1752, Campbell *a.* MacLauchlan, Kilker. (Proof) No 16. p. 448. Mor. 12,286. Neither do they require stamps, in terms of an exemption in the stamp act, of "memorandums, letters, or agreements, made for, or relating to the sale of any goods, wares, or merchandize."

[d] 1681, Ewing *a.* Burnet. Mor. 8219; and, 1731, Earl of Dundonald *a.* Watson, Dict. i. 547. Mor. 8222.

letter had repaid it. But it is now well ascertained, that the writer of the letter is liable for the advance, without any such notification.

Case of Mansfield *v.* Weir.

Weir gave Johnston a letter of credit upon Mansfield, of the following tenor:—"According to our communing Saturday last, with respect to George Johnston, you will be pleased to give him credit for L.150, and I promise to see you paid." Mansfield, accordingly, gave Johnston letters to his correspondents in England, to let him have what goods he wanted to that extent; with which credit, having gone immediately to England, he, upon his return, set up a shop, which he kept for about two years, and then stopped and absconded. Mansfield brought an action against Weir for payment, and proved the credit given, by the bills drawn by his correspondents in England, partly on himself, partly on Johnston, which he paid and retired, and by the invoices accompanying these drafts. Weir pleaded, in defence, that no notification of the credit having been given, was made to him prior to the raising of the action. The Lords, however, repelled the defence, and found him liable.[e]

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[e] 1749, Mansfield *a.* Weir, Kilker. No 2, p. 337. Mor. 8224.—See also Ewing *v.* Wright, 2d June, 1808. Mor. App. to Letter of Credit, where a person guaranteeing the price of yarn, to be furnished within a year from the date of the order, was found liable, though he pleaded, that no notification was given him of the furnishings made.

A similar determination was given in the case of Hamilton *a.* Carlisle & Dunlop, in 1766.

Case of Hamilton *v.* Carlisle and Dunlop.

In 1762, Douglas of Glasgow wrote to Hamilton of London, that he wanted to raise L. 500, by drawing bills on London at long dates, and remitting bills at short dates to replace them, and asked leave to draw on him for that purpose, promising to get the security of J. Carlisle and J. Dunlop, with whom he was engaged in a copartnery trade. The proposal being agreed to, a letter was subscribed by Carlisle & Co. referring to Douglas's letter, and engaging their security for such sums as Douglas should draw for. In January 1763, Hamilton, who had hitherto traded by himself, assumed a partner into his house, but continued to answer the bills drawn by Douglas, as he had done before, till August 1763, when he was in advance about L. 608. Carlisle & Co. stopped payment in November 1763, and Douglas accepted bills for the balance due; but he having also failed, Hamilton brought an action against J. Carlisle and J. Dunlop the guarantees, who objected that they were not liable for the bills drawn by Douglas, in respect they were not intimated to them. And admitting that it was not necessary to intimate every individual draft, yet intimation ought to have been made when any material circumstance occurred, such as might have led them to withdraw their security, or warned them to look for relief. Two periods were pointed out; the one when Hamilton assumed a

partner in January,—the other when his dealings with Douglas came to an end, in August, 1763. To which it was answered, that the pursuer could be bound no further, than to comply with the conditions of the mandate. But the letter contained no clause requiring intimation of the advances, of which the defenders, the partners of Douglas, could not be ignorant. And there was no reason for a particular intimation upon the pursuer's assuming a partner, which made no alteration upon the credit. The Court found the letter of credit extended to the sum of L.500, and that the company was liable to that extent.[f]

Guarantees are *strictissimi juris.*

The terms of a letter of credit must be strictly complied with by him to whom it is addressed, otherwise the granter is freed from his obligation.

Case of Paisley *v.* Rattray.

An order having been given by Rattray to Paisley, to furnish C. & J. Nisbets with sugars, to the extent of L. 10, on their joint bill, at such date as might be agreed upon, which, if not retired, he would see paid, the sugars were furnished by Paisley; but no bill was taken by him from the Nisbets for the amount. J. Nisbet went soon after to settle in London, and C. Nisbet became bankrupt; upon which Paisley pursued Rattray and the Nisbets for payment of a balance still due of the price of the sugars.

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[f] Fac. Coll. No 33, p. 255; Mor. 8227.—See also Stewart *a.* Drew, 17th February, 1779, (note to above case.)

Rattray stated, in defence, that Paisley the pursuer had deviated from the terms of the mandate, by not taking a bill from Nisbets for the amount of the goods furnished, which was sufficient to bar the action of recourse. Rattray was not obliged to show, that he suffered a loss by this deviation from the mandate. In order to found the mandatory in any action against the mandant, he must implement the terms of the mandate specifically. Paisley was not at liberty to substitute an open account in place of the bill, even though it had been equally beneficial to the mandant. But an open account is not held as equivalent to a bill; and it would be a dangerous precedent in mercantile transactions, if letters of credit were to be so interpreted. A bill affords a more easy and expeditious method of obtaining payment; and therefore, it is a deviation to the prejudice of the writer of the letter, if it is neglected to be got when stipulated. And so the Court found.[g]

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[g] 1779, Paisley *a.* Rattray, Fac. Coll. No 51, p. 91; Mor. 8228. So in Maclaggan & Co. *v.* Macfarlan, 19th Nov. 1813, Fac. Coll., in which the suspender had agreed to guarantee the payment, by Baird & Co. to the chargers, of several puncheons of aqua, "at the expiry of three months," it was held, that the guarantee did not cover bills at 100 days; but as to bills at 95 days, on evidence, that by the usage of the trade a few days over the three months were usually allowed, the suspender was held liable.

The same principle has been since applied in various cases. Thus, in Stewart *v.* Scott, 31st May, 1803, Bell's Comm. I. 286, it appeared, that the defender had written to Mr Sandeman, in Leith, begging him "to introduce the three gentlemen, who

Implied guarantee.

A letter of credit may be constituted, so as to make the writer liable, though it do not expressly bear that he interposes his security, or meant to come under any direct engagement, if it be such as to induce the person to whom it is addressed to give credit, when he otherwise might not.

Case of Crichton & Co. v. Jack.

Brown sent Crichton, Strachan, Bell, & Co. an order for a quantity of sugar, to which Jack,

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will deliver you this, to any of your corn or grain merchants, assuring them of their safety in any bargain they may make with them." Two only of these persons went to Leith, and they, not finding Mr Sandeman, went direct to a corn merchant, (the pursuer,) who sold them a cargo of oats on the recommendation. The Court were doubtful if the letter amounted to a guarantee; but, at all events, it is stated, that they held, "first, that Scott had relied on all the three persons, and in their mutual discretion in the proceedings to be taken under his letter; and, second, that he had mainly relied on Sandeman's discretion to introduce his friends to proper dealers." In Philips *v.* Melville, 21st Feb. 1809, Fac. Coll., it was held that a guarantee for spirits, addressed by Melville to Durie, in favour of Mrs Yetts, was not available to Philips, to whom Durie had referred Mrs Yetts, and transferred the letter of credit. And in Houston's executors *v.* Spiers and others, 4th March, 1820, Fac. Coll., in which the circumstances were, that the defenders guaranteed to "the Hon. Simon Fraser & Co., merchants in London," bills to be drawn on them by Walter Logan, and that company subsequently directed Logan to draw on "the Hon. Simon Fraser, Perring, Godfrey, Shaw, Barber, & Co.," (of which the partners were different,) stating in the body of the bill, value in account with the former company, it was held, that this deviation from the terms of the guarantee freed the defenders.

From the principle of these cases, it may be doubted, how far (in the case of Hamilton *v.* Carlisle and Dunlop, *sup.*) the advances, after the assumption of a new partner by Hamilton, ought to have been sustained against the defenders. See Bell's Comm. *ib.*

Where the change of partners, however, takes place in a company, to whom the commodities are to be furnished, the holders of the guarantee do not forfeit the benefit of it as to furnishings made *bona fide*, before they were aware of the change. Douglas, Wilson, and Macaulay, *v.* Gordon & Co. 24th December, 1814. Fac. Coll.

who had formerly been in the practice of dealing with them, subjoined the following note, addressed to Crichton & Co. "15th February, 1796. Gentlemen,—My friend, Mr Brown, is a young man merely begun business. You may safely send him the above order. In doing which, you will very much oblige yours, &c.

(Signed) "WM. JACK."

Crichton & Co. accordingly, on the 16th February, sent Brown a part of the sugar commissioned; and in consequence of a new order, they sent him, on the 29th March, a small additional quantity. About the middle of June thereafter, Brown became bankrupt, and left the country; on which Crichton & Co. brought an action for the price of the sugar against him and also against Jack, who, they contended, had become his cautioner, by the letter of credit which he added to the first order. In defence, Jack stated, that his uniform practice of dealing with the pursuers had been on two months credit; and that Brown was solvent, not only on the 15th February, 1796, the date of his letter, but for upwards of three months thereafter. He further pleaded, that the letter founded on is merely a declaration that Brown was solvent at its date; and it was an established principle of the mercantile law, both in this country and England, that no action will lie on such letter, if the writer really believed the person recommended to be solvent, although in this he should be mistaken. But Brown was solvent both on the 15th February, and for a

period after it, which exceeded the length of the credit usually given by the pursuers. So that, even if the letter were actionable, the delay on their part, considering the unfavourable nature of a cautionary obligation, would have been a relevant defence against the action. The Lord Ordinary repelled the defences, and found expenses due; and a reclaiming petition against the judgment was refused without answers.[g]

Liability of granter of letter.

In delivering a letter of credit, care should be taken that it be explicitly worded, so as to exclude any latitude of interpretation, as to the sum to be advanced beyond what was intended; or any optional power in the receiver to apply to

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[g] 1797, Crichton & Co. *a.* Jack, Fac. Coll. No 41, p. 97; Mor. 8229. In like manner, in Rankine *v.* Murray and Muir, 15th May, 1812, Fac. Coll., the defenders addressed a letter to the pursuer in these terms:—"David Shannon has taken a house in Dumfries, and intends opening for a sale of spirits and ale at the term. The lad has always behaved himself with propriety hitherto, and I doubt not will give satisfaction in any transactions he may have with you." Rankine furnished Shannon with spirits to the value of L.20, at the usual credit, and when payment became due, took his bill at three months, without communication with the defenders. They were found liable, though the Court had much difficulty in holding, that the terms of the letter amounted to a guarantee. See also Stewart *v.* Scott, *sup.* In Philips *v.* Melville, *sup.*, the terms of the letter were, "I am sure she will pay you at the time she may fix with you, so you are quite safe with her, as Mr Goodsir can also inform you." The Court held, that this would have been a binding guarantee in favour of Durie.

In such cases, it appears that a voluntary testimonial of a person's credit and responsibility will be construed more unfavourably for the party who sends it, than an opinion given in consequence of previous inquiries on the part of the furnisher of the goods. But if the information communicated be contrary to the writer's knowledge of the real circumstances of the party, he will be liable for furnishings made on the faith of his communication. Bell's Comm. I. 284, and cases there cited.

different persons for the same sum; for if each of these persons be applied to and furnish the money, the writer will be liable to both for the amount furnished.

Case of Elliot v. Home.

G. Home wrote a letter to his brother, J. Home of London, "that he was content to advance him L.30 to supply his necessity, and had written to Edinburgh to send him credit for it; but that if he thought it would be too long ere it came to his hand that way, he might show his letter to Mr Foulis, and give him a bill upon him for the L.30, which should be honoured, and so to get the money from him or Mr Elliot, and it would be punctually paid."

J. Home, having taken up the L. 30, from Mr Foulis, drew a bill upon his brother for it, which was paid; and some months after, drew another bill upon him for L. 13, payable to Mr Elliot, who pursued G. Home for payment. G. Home contended, that he could not be liable for the L. 13, because his letter was fulfilled by paying to Mr Foulis the L. 30 therein contained, several months before his brother received the L. 13 from Mr Elliot; and he could never be liable by his letter for twice payment of the same sum. In reply to which, it was stated, that the defender's letter to his brother being a letter of credit for taking up L. 30 from Mr Foulis or Mr Elliot; although he got the sum from Mr Foulis, yet, having kept the letter, and showed it afterwards to Mr Elliot, the latter was *in bona fide* to advance money on it, not knowing that

Foulis had already made payment. For the defender, after he repaid the L. 30 to Mr Foulis, should have got up his letter; and that being omitted, he ought to be liable for the L. 13. And the Court accordingly found him liable.[1]

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[1] 1705, Elliot *a.* Home, Dict. v. 1. p. 546; Forbes's, Dec. p. 38, Mor. 8221.

The limitations of the extent of the surety's obligation, under such letters, are stated by Mr Bell, Comm. I. 246, to be,—"1st, That where any particular transaction is specified, or distinctly pointed at, the guarantee can be held to apply only to that transaction. As where a letter of credit is subjoined to an order for goods, the guarantee is specific.—2. That where the expression is general, for *any* dealings to a limited extent, the guarantee will be limited in respect of the sum, but extended to other transactions, and held, in mercantile phrase, a standing guarantee.—3. That where it is quite unlimited in extent, the discretion of those to whom it is addressed is strictly referred to.—4. That it may apply to goods agreed to be sold the day before, but not delivered till after."

A person sometimes guarantees the payment of a bill, and it is held, in such a case, that the guarantee is not entitled to complain of want of due presentment to the accepter, unless he can prove actual damage from the neglect. Warrington & another *v.* Furbor and another, 8. East, 242, where the accepters had become bankrupts before the day of payment, and it was held, that want of presentment would not free the guarantees. But in Philips *v.* Astling, 2. Taunt. 206, where the insolvency of the drawer and bankruptcy of the accepter did not happen till long after the bill became due, it was held, that for any thing that appeared, if the money had been demanded either of the drawer or accepter, the bill might have been paid; but that the necessary steps not having been taken to obtain payment from the parties who were liable upon the bill, and solvent, the guarantee must be discharged. See Bayley, 232-3. Chitty, 204, 259. The same is held as to notice to the guarantee of the dishonour of the bill; the neglect of which will not free him, unless he show he has been thereby prejudiced. See Swinyard *v.* Bowes, 5. Maule, and S. 62. Bayley, *sup.*

It is a questionable point, whether the benefit of such a guarantee can be transferred to an indorsee of the bill. In Sir William Forbes & Co. *v.* M'Nab, 29th May, 1816, Fac. Coll., the Court, after an inquiry into mercantile practice, held the guarantee to be available to indorsees to whom it had been delivered along with the bill. Mr Bell, Comm. I. 288, makes the

following observations on that case :—" Before the point can be held established, a much more deliberate inquiry must be made into the usage ; if, indeed, any usage can make a point against the principles of law, which this seems to be. It may be, that the very design of expressing the guarantee by letter, instead of indorsing the bill, is to preserve to the writer the full benefit of his remedy against the person to whom the letter is addressed. And it is anomalous at once to confer on such an engagement the privileges of an indorsable and negotiable instrument, and yet not give to the granter of it the benefit of that strict negotiation, which is the counter-part of the privileges of bills."

# APPENDIX,

## No I.

### ADDITIONAL FORMS OF BILLS FOREIGN AND DOMESTIC.

No 1.

Exch. for L.615 : 1 : 9 Sterling, at 40 per cent.

*Jamaica, 26th April,* 1806.

Ninety days after sight of this our second of exchange, (first and third of the same tenor and date not paid), pay to the order of Mr John Beveridge, six hundred and fifteen pounds one shilling and ninepence Sterling, value received, and place the same, with or without further advice, to the account of

*To Messrs Leitch and Gordon, merchants, Glasgow.* } SMITH, JOHNSTON, & Co.

No 2.

*St Petersburgh, the 28th August,* 1806.—R[a] 4000, at 31⅛d. Sterl. p. R.

Three months after date, pay this our first of exchange (second not paid), to the order of Mr John Mackenzie, the sum of four thousand rubles, at thirty-one and one-eighth pence Sterling per ruble, value in account, as per advice from

*To Messrs W. & S. Scott, merchants, Glasgow.* } WM. GRIERSON & Co.
W. & S. Scott.

Payable at our counting-house.[a]

This bill is due on the 9-12th December.

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[a] See *sup.* p. 164-5, note.

No 3.

Exch. for £800 Ster. at 11½ florins p. pound.

*London,* 18th *March,* 1807.

At two and one-half usances, pay this my second of exchange (first not paid), to Mr Edward Hope, or order, the sum of three hundred pounds Sterling, at eleven and one-half florins p. pound, value in account as advised.

*To Messrs Ermanthal & Co.*
*Rotterdam.*

JOHN TOMLINSON.

No 4.

Exch. p. £2500 Sterling. *St Christopher's,* 11*th November,* 1806.

Ninety days after sight of this our third of exchange, (first and second of the same tenor and date not paid), pay to the order of Mr James Swinton, two thousand five hundred pounds Sterling, value received in negroes for your estate, and place it to account of Mr Timothy Barbour, as per advice.

*To Jacob Finlayson, Esq.*
*Glasgow.*

J. HODGSON, for Self & Q. Q. JACOB FINLAYSON.

This bill is drawn per procuration, or Q. Q. (*Qualitate Qua*) of the drawee; and therefore, if he refuses to accept, he may be charged on horning as a drawer.

No 5.

*Lisbon,* 16*th September,* 1806. Exchange p. Milrees 5000.

At thirty days sight, pay this my second of exchange (first not paid) to the order of Mr Archibald Wilson, five thousand milrees, at five shillings and twopence per milree, value in account with St Antonio Videtti, and place it to your account, as per advice.

*To Mr Henry Williamson,*
*merchant, Edinburgh.*

WM. GLENLINSON.

No 6.

*Hamburgh, the* 13*th May,* 1806,—for £200 Sterling.

At three usances, pay this our first of exchange (second not paid) to the order of Messrs J. Hobson & Co., the sum of two hundred pounds Sterling, value of the same, and place it to account, as per advice from

*To Messrs Thomas Wellesley & Co.*
*London.*

BLAIKER & Co.

Accepted. THOS. WELLESLEY & Co.

No 7.

Exch. for Lrs. T. 2000. *London, 29th April,* 1796.

At usance, pay this, my only bill of exchange, to Mr Pierre Duton, or order, two thousand livres tournois, value received, and place it to my account, with or without advice.

*To Messrs J. & T. Berger & Co. merchants, Basle.* WALTER RICHARDSON.

Acc^e. J. & T. BERGER & Co.
pour deux mille livres tournois.

No 8.

Exchange for £100. *New York, 22d August,* 1806.

Thirty days after sight of this my first of exchange, (second, third, and fourth, of the same tenor and date not paid), please pay Mr John Donald, or order, one hundred pounds Sterling, value received, which place to account, with or without further advice from

Your humble servant,

*To Mr James Jeffrey, Glasgow.* RICHD. DICKSON.

No 9.

£100 Sterling. *Edinburgh, 7th April,* 1807.

Ninety days after date, pay this, my only bill of exchange, to Mr James Jefferson, or order, one hundred pounds Sterling, value received of him, and place the same to account, as per advice (or without further advice) from

*To Mr Robert Wallace, merchant, Dumfries.* RICHD. DICK.

Accepted. ROBERT WALLACE.
Payable at my counting-house.

No 10.

£175 Sterling. *Glasgow, 5th June,* 1806.

Conjunctly and severally, at the term of Martinmas first to come, pay to me, or my order, at the Ship Bank here, the sum of one hundred and seventy-five pounds Sterling, for value received.

*To Messrs James Hamilton, merchant in Glasgow, and John Fraser, farmer at Westburn.*

*p.* Proc^n of J^s White.
ROB. THOMSON.
JAS. HAMILTON.
JOHN FRASER.

No 11.

£57 *Greenock, 6th May,* 1807.

At sight, pay to William Grose, Esq., or order, fifty-seven pounds Sterling, which place to my account, without further advice.

*To Mr Nicholas Brown, merchant, Aberdeen.* } HENRY GORDON.

A FRENCH BILL.

*Basle, le* 1 *Juillet,* 1806. Pour £195 : 17 : 6 Sterling.

Au huit Octobre prochain, payez par cette seconde de change, (la premiere ne l'étant), à l'ordre de Mrs Gros Davillier & Co., cent quatre vingt quinze livres, dix sept sols, six deniers Sterling, valeur en compte, que vous passerez, suivant avis de

*A Messieurs Mrs Is. Cazenan & Co. Londres.* } E. B. ROLLAND.

DES ENDOSSEMENS.

Payez à l'ordre de Messrs J. R. Desarts, valeur reçue le 8 Juillet 1806.

GROS DAVILLIER & Co.

Payez à l'ordre de Monsr B. L. Fould, valeur en compte.

*Paris,* 8 *Juillet,* 1806. J. R. DESARTS.

Pay to the order of Mr John Thorburn, value in account.

B. L. FOULD.

A FRENCH BILL IN THE REVOLUTIONARY STYLE.

*Bordeaux le* { *sixieme Nivose, an* 12. / 27 *Decembre* 1803. } Pour 2000 ecus, à 55 d.

A deux usances, payez par cette premiere de change au Citoyen Durand de cette commune, ou ordre, deux mille ecus à cinquante cinq deniers de gros, valeur reçue comptant du Citoyen Cordova, et la passerez, suivant l'avis de

Votre affectionnné ami,

*Aux Citoyens Williams, freres, negocians à Amsterdam.* } BEAULIEU.

AN ITALIAN BILL.

*Venezia, li* 13 *Novembre,* 1801. Pr £367 : 1 : 4 Ster.

Ad uso pagate pr questa seconda di cambio (una sol volta) all ordine S. P. delli Sigri Willm Richardson & Comp. la somma di Lire trecento sessanta sette, soldo uno, & denari quatro Sterg valuta in conto e ponteli, come p. la d'aviso Addio.

*Alli Sigri Todd & Popple, di Hull.* } GIOVACCHINO SPADONI.

Pagabile in Londra.

A GERMAN BILL.

*Hamburg, den* 9 *September,* 1806, für £260 : 0 : 0 Sterling.

Drey monath nach dato, bezahten sie gegen diesen secunda wechsel (prima nicht) an die order der Herren Gebrüder Bethmann zwey hundert und sechszig pfund Sterling den werth in rechnüng und stellen solgen in rechnüng laut bericht.

*Herren*
*A. & D. Dahlmund*
*in London.*

G. S. KRONHELM.

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# APPENDIX,

## No II.

### STAMP ACT.

*Extract from the Statute, 55th George III. Ch.* 184, *of the Clauses relative to the Stamps of Bills and Promissory-notes; with the Schedule of Duties and Exemptions.*

X. And be it further enacted, That from and after the passing of this act, all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law; except in cases where the stamp or stamps, used on such instruments, shall have been specially appropriated to any other instrument, by having its name on the face thereof.

Instruments having wrong stamps, but of sufficient value, to be valid. Exception.

XI. And be it further enacted, that if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, or shall accept or pay, or cause or permit to be accepted or paid, any bill of exchange, draft or order, or promissory-note for the payment of money, liable to any of the duties imposed by this act, without the same being duly stamped for denoting the duty hereby charged thereon, he, she, or they, shall for every such bill, draft, order, or note, forfeit the sum of fifty pounds.

Penalty for making, accepting, or paying bills of exchange, &c., not duly stamped, £50.

XII. And be it further enacted, that if any person or persons shall make and issue, or cause to be made and issued, any bill of exchange, draft or order, or promissory-note for the payment

Penalty for post-dating bills of exchange, &c., £100.

of money, at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that it shall not in fact become payable in two months, if made payable after date, or in sixty days, if made payable after sight, next after the day on which it shall be issued, unless the same shall be stamped for denoting the duty hereby imposed on a bill of exchange and promissory-note for the payment of money at any time exceeding two months after date, or sixty days after sight, he, she, or they, shall, for every such bill, draft, order, or note, forfeit the sum of one hundred pounds.

Penalty for issuing unstamped drafts on bankers, without specifying the place where issued, or if post-dated, £100.

XIII. And for the more effectually preventing of frauds and evasions of the duties hereby granted on the bills of exchange, drafts, or orders for the payment of money, under colour of exemption in favour of drafts or orders upon bankers or persons acting as bankers, contained in the schedule hereunto annexed, be it further enacted, That if any person or persons shall, after the 31st day of *August*, 1815, make and issue, and cause to be made and issued, any bill, draft, or order, for the payment of money to the bearer on demand, upon any banker or bankers, or any person or persons, acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in every respect fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to this act, the person or persons so offending shall for every such bill, draft, or order, forfeit the sum of L.100; and if any person or persons shall knowingly receive or take any such bill, draft, or order, in payment of, or as a security for the sum therein mentioned, he, she, or they shall for every such bill, draft, or order, forfeit the sum of L.20; and if any banker or bankers, or any person or persons acting as a banker, upon whom any such bill, draft, or order shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or knowing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not in any other respect fall within the said exemption, then the banker or bankers, or person or persons so offending, shall for every such bill, draft, or order, forfeit the sum of L.100, and moreover, shall not be allowed the money so paid, or any part thereof, in account against the person or persons, by or for whom such bill, draft, or order, shall be drawn, or his, her, or their executors, or administrators, or his or her assignees or creditors, in case of bankruptcy or insolvency, or any other person or persons claiming under him, her, or them.

Penalty for receiving such drafts, £20; and on bankers for paying them, £100, &c.

Promissory-notes to bearer

XIV. And be it further enacted, That from and after the 31st day of *August* 1815, it shall be lawful for any banker or

bankers, or other person or persons, who shall have made and issued any promissory-notes for the payment to the bearer on demand, of any sum of money not exceeding L.100 each, duly stamped according to the directions of this act, to re-issue the same from time to time, after payment thereof, as often as he, she, or they shall think fit, without being liable to pay any further duty in respect thereof; and that all promissory-notes, so to be re-issued as aforesaid shall be good and valid, and as available in the law, to all intents and purposes, as they were upon the first issuing thereof.

on demand, not exceeding £100, may be re-issued by the original maker without further duty.

*The intermediate sections relate to the issuing of bank-notes, the duties payable on them, and the licenses of bankers.*

XXIX. And be it further enacted, That from and after the passing of this act, promissory-notes for the payment of money to the bearer on demand, made out of *Great Britain*, or purporting to be made out of *Great Britain*, or purporting to be made by or on the behalf of any person or persons resident out of *Great Britain*, shall not be negotiable or be negotiated, or circulated, or paid in *Great Britain*, whether the same shall be made payable in *Great Britain* or not, unless the same shall have paid such duty and be stamped in such manner as the law requires for promissory-notes of the like tenor and value made in *Great Britain;* and if any person or persons shall circulate or negotiate, or offer in payment, or shall receive or take in payment, any such promissory-note, or shall demand or receive payment of the whole, or any part of the money mentioned in such promissory-note, from or on account of the drawer thereof in *Great Britain*, the same not being duly stamped as aforesaid; or if any person or persons in *Great Britain* shall pay, or cause to be paid the sum of money expressed in any such note, not being duly stamped as aforesaid, or any part thereof, either as drawer thereof, or in pursuance of any nomination or appointment for that purpose therein contained, the person or persons so offending shall, for every such promissory-note, forfeit the sum of L.20, provided always, that this clause shall not extend to promissory-notes made and payable only in *Ireland*.

Promissory-notes made out of Great Britain, not to be negotiable unless stamped.

Penalty on circulating such notes, &c. £20 for each.

SCHEDULE OF DUTIES AND EXEMPTIONS.

INLAND BILL of EXCHANGE, draft, or order to the bearer, or to order, either on demand or otherwise, not exceeding two months after date, or sixty days after sight, of any sum of money,

| | | | |
|---|---|---|---|
| Amounting to 40s. and not exceeding £5, 5s. | £0 | 1 | 0 |
| Exceeding £5, 5s., and not exceeding £20, | 0 | 1 | 6 |
| Exceeding £20, and not exceeding £30, - | 0 | 2 | 0 |
| Exceeding £30, and not exceeding £50, - | 0 | 2 | 6 |
| Exceeding £50, and not exceeding £100, - | 0 | 3 | 6 |

| | | | |
|---|---|---|---|
| Exceeding £100, and not exceeding £200, | £0 | 4 | 6 |
| Exceeding £200, and not exceeding £300, | 0 | 5 | 0 |
| Exceeding £300, and not exceeding £500, | 0 | 6 | 0 |
| Exceeding £500, and not exceeding £1000, | 0 | 8 | 6 |
| Exceeding £1000, and not exceeding £2000, | 0 | 12 | 6 |
| Exceeding £2000, and not exceeding £3000, | 0 | 15 | 0 |
| Exceeding £3000, | 1 | 5 | 0 |

INLAND BILL OF EXCHANGE, draft, or order for the payment to the bearer or to order, at any time exceeding two months after date, or sixty days after sight, of any sum of money

| | | | |
|---|---|---|---|
| Amount to 40s., and not exceeding £5, 5s. | £0 | 1 | 6 |
| Exceeding £5, 5s. and not exceeding £20, | 0 | 2 | 0 |
| Exceeding £20, and not exceeding £30, | 0 | 2 | 6 |
| Exceeding £30, and not exceeding £50, | 0 | 3 | 6 |
| Exceeding £50, and not exceeding £100, | 0 | 4 | 6 |
| Exceeding £100, and not exceeding £200, | 0 | 5 | 0 |
| Exceeding £200, and not exceeding £300, | 0 | 6 | 0 |
| Exceeding £300, and not exceeding £500, | 0 | 8 | 6 |
| Exceeding £500, and not exceeding £1000, | 0 | 12 | 6 |
| Exceeding £1000, and not exceeding £2000, | 0 | 15 | 0 |
| Exceeding £2000, and not exceeding £3000, | 1 | 5 | 0 |
| Exceeding £3000, | 1 | 10 | 0 |

*The same duty as on a bill of exchange for the like sum payable to bearer or order.*

INLAND BILL, draft, or order for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall be delivered to the payee, or some person in his or her behalf.

*The same duty as on a bill payable to bearer or order on demand, for a sum equal to such total amount.*

INLAND BILL, draft, or order for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or some person in his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom.

*The same duty as on a bill on demand for the sum therein expressed only.*

And where the total amount of the money thereby made payable shall be indefinite.

And the following instruments shall be deemed and taken to

be inland bills, drafts, or orders, for the payment of money within the intent and meaning of this schedule, *videlicet*,—

All drafts or orders for the payment of any sum of money by a bill or promissory-note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person in his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received which shall entitle, or be intended to entitle, the person or persons paying the money or the bearer of such receipts to receive the like sum from any third person or persons.

And all bills, drafts, or orders, for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

*The same duty as on an inland bill of the same amount and tenor.*

FOREIGN BILL OF EXCHANGE, (or bill of exchange drawn in but payable out of *Great Britain*) if drawn singly and not in a set.

FOREIGN BILLS of EXCHANGE drawn in sets according to the custom of merchants, for every bill of each set, where the sum made payable thereby shall not exceed £100, £0 1 6

| | | | |
|---|---|---|---|
| Where it shall exceed £100, and not exceed £200, | 0 | 3 | 0 |
| Where it shall exceed £200, and not exceed £500, | 0 | 4 | 0 |
| Where it shall exceed £500, and not exceed £1000, | 0 | 5 | 0 |
| Where it shall exceed £1000, and not exceed £2000, | 0 | 7 | 6 |
| Where it shall exceed £2000, and not exceed £3000, | 0 | 10 | 0 |
| And where it shall exceed £3000, | 0 | 15 | 0 |

EXEMPTIONS FROM THE PRECEDING AND ALL OTHER STAMP-DUTIES.

*All bills of exchange, or bank post-bills issued by the Governor and Company of the Bank of England.*

*All bills, orders, remittance-bills, and remittance-certificates, drawn by commissioned officers, masters, and surgeons in the navy, or by any commissioner or commissioners of the navy, under the authority of the act passed in the 35th year of his Majesty's reign, for the more expeditious payment of the wages and pay of certain officers belonging to the navy.* 35 Geo. III. c. 94.

*All bills drawn pursuant to any former act or acts of Parliament by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for ma-*

*naging the transport-service, and for taking care of sick and wounded seamen, upon and payable by the treasurer of the navy.*

*All drafts, or orders, for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker, within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders; and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payment to be made by bills or promissory-notes.*

*All bills for the pay and allowances of his Majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms now prescribed, or hereafter to be prescribed, by his Majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army depot, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorised to perform the duties of the paymastership during a vacancy, or the absence, suspension, or incapacity of any such paymaster, as aforesaid;* save and except such bills as shall be drawn in favour of contractors or others, who furnish bread or forage to his Majesty's troops, and who, by their contracts or agreements, shall be liable to pay the stamp-duties on the bills given in payment for the articles supplied by them.

PROMISSORY-NOTE, for the payment to the *bearer on demand*, of any sum of money,

| | | | |
|---|---|---|---|
| Not exceeding £1, 1s., | £0 | 0 | 5 |
| Exceeding £1, 1s., and not exceeding £2, 2s., | 0 | 0 | 10 |
| Exceeding £2, 2s., and not exceeding £5, 5s., | 0 | 1 | 3 |
| Exceeding £5, 5s., and not exceeding £10, | 0 | 1 | 9 |
| Exceeding £10, and not exceeding £20, | 0 | 2 | 0 |
| Exceeding £20, and not exceeding £30, | 0 | 3 | 0 |
| Exceeding £30, and not exceeding £50, | 0 | 5 | 0 |
| Exceeding £50, and not exceeding £100 | 0 | 8 | 6 |

Which said notes may be re-issued, after payment thereof, as often as shall be thought fit.

PROMISSORY-NOTE for the payment, *in any other manner than to the bearer on demand*, but not exceeding two months after date, or sixty days after sight, of any sum of money,

| | | | |
|---|---|---|---|
| Amounting to 40s., and not exceeding £5, 5s., | £0 | 1 | 0 |
| Exceeding £5, 5s., and not exceeding £20, | 0 | 1 | 6 |
| Exceeding £20, and not exceeding £30, | 0 | 2 | 0 |
| Exceeding £30, and not exceeding £50, | 0 | 2 | 6 |
| Exceeding £50, and not exceeding £100, | 0 | 3 | 6 |

These notes are not to be re-issued after being once paid.

PROMISSORY-NOTE for the payment, *either to the bearer on demand, or in any other manner than to the bearer on demand,* but not exceeding two months after date, or sixty days after sight, of any sum of money,

| | | | |
|---|---|---|---|
| Exceeding £100, and not exceeding £200, . | £0 | 4 | 6 |
| Exceeding £200, and not exceeding £300, . . | 0 | 5 | 0 |
| Exceeding £300, and not exceeding £500, . | 0 | 6 | 0 |
| Exceeding £500, and not exceeding £1000, . | 0 | 8 | 6 |
| Exceeding £1000, and not exceeding £2000, . | 0 | 12 | 6 |
| Exceeding £2000, and not exceeding £3000, . | 0 | 15 | 0 |
| Exceeding £3000, . . . . . | 1 | 5 | 0 |

These notes are not to be re-issued after being once paid.

PROMISSORY-NOTE for the payment to the bearer or otherwise, at any time exceeding two months after date, or sixty days after sight, of any sum of money,

| | | | |
|---|---|---|---|
| Amounting to 40s., and not exceeding £5, 5s. | £0 | 1 | 6 |
| Exceeding £5, 5s., and not exceeding £20, . | 0 | 2 | 0 |
| Exceeding £20, and not exceeding £30, . . | 0 | 2 | 6 |
| Exceeding £30, and not exceeding £50, . . | 0 | 3 | 6 |
| Exceeding £50, and not exceeding £100, . | 0 | 4 | 6 |
| Exceeding £100, and not exceeding £200, . | 0 | 5 | 0 |
| Exceeding £200, and not exceeding £300, . . | 0 | 6 | 0 |
| Exceeding £300, and not exceeding £500, . | 0 | 8 | 6 |
| Exceeding £500, and not exceeding £1000, . . | 0 | 12 | 6 |
| Exceeding £1000, and not exceeding £2000, . | 0 | 15 | 0 |
| Exceeding £2000, and not exceeding £3000, . | 1 | 5 | 0 |
| Exceeding £3000, . . . . . | 1 | 10 | 0 |

These notes are not to be re-issued after being once paid.

PROMISSORY-NOTE for the payment of any sum of money by instalments, or for the payment of several sums of money, at different days or times, so that the whole of the money to be paid shall be definite and certain.

*The same duty as on a promissory-note payable in less than two months after date for a sum equal to the whole amount of the money to be paid.*

And the following instruments shall be deemed and taken to be promissory-notes, within the intent and meaning of this schedule, viz.:

All notes, promising the payment of any sum or sums of money out of any particular fund, which may or may not be

available; or upon any condition or contingency, which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, and if the same shall be definite and certain, and not amount in whole to £20.

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited.

### EXEMPTIONS FROM THE DUTIES ON PROMISSORY-NOTES.

*All notes, promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen, where the same shall not be made payable to the bearer or order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to £20, or be indefinite.*

*And all other instruments, bearing in any degree the form or style of promissory-notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory-notes.*

But such of the notes and instruments here exempted from the duty on promissory-notes, shall, nevertheless, be liable to the duty which may attach thereon, as agreements or otherwise.

### EXEMPTIONS FROM THE PRECEDING AND ALL OTHER STAMP-DUTIES.

*All promissory-notes for the payment of money, issued by the Governor and Company of the Bank of England.*

# APPENDIX,

## No III.

### FORM OF ACCEPTANCE SUPRA PROTEST BY A THIRD PARTY.

At Glasgow, the day of eighteen hundred and

In presence of me, A. B., notary-public, residing in Glasgow, by royal authority duly admitted and sworn, and of the witnesses subscribing, *appeared* C. D., merchant in Glasgow, along with J. K., the holder of an original bill of exchange, dated the sixth day of February last, drawn by E. F. of the island of Jamaica, upon G. H., merchant in Glasgow, whereby the said E. F. ordered him, ninety days after sight, (second and third of the same tenor and date unpaid), to pay to the said J. K. or order, the sum of three hundred and fifty pounds Sterling. Which bill the said J. K. exhibited, together with a protest at his instance against the said G. H., the drawee, for non-acceptance. And then and there the said C. D. declared, that in order to prevent the return of the said bill, and the charges which might thereby be occasioned, he would, and did accept the same for the honour of the said E. F. the drawer; and *Protested* that his said acceptance should no otherwise be construed; and that he reserved all right of action and relief competent to him against the said E. F. in consequence of his acceptance of the said bill, as accords with law. *Whereupon* the said C. D. took instruments in my hands. *Thus* done and protested, before and in presence of M. N. and O. P., witnesses to the premises specially called and required.

When the bill is accepted by the drawee in honour of the drawer, the quality of the acceptance may be specified in the protest for non-acceptance, (as in next form): And when a bill is paid by a third party *supra* protest, for the honour of the drawer or indorser, the instrument is *mutatis mutandis*, the same as the above.

## FORM OF PROTEST OF A FOREIGN BILL FOR NON-ACCEPTANCE.

*On this day*, the of one thousand eight hundred and

At the request of bearer of the original bill of exchange, whereof a true copy is on the other side (or above) written, I, A. B. of Glasgow, notary-public, by royal authority duly admitted and sworn, did exhibit the said bill to C. D., upon whom the same is drawn, and demanded that he should accept the same. *Whereunto* he answered (Here insert the answer.) *Wherefore* I the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the said C. D. and the drawer and indorsers of the said bill, as all others whom it may concern, for non-acceptance, and for exchange, re-exchange, costs, charges, damages, and interest, suffered and to be suffered for want of acceptance of the said bill. *Thus* done and protested in Glasgow, in the presence of E. F. & J. G. witnesses.

*In testimonium veritatis,*
R. H., *N. P.*

The protest for non-payment is nearly the same.

The form of the acceptance by the drawee, by Act of Honour, for behoof of the drawer, when subjoined to the protest for non-acceptance, is as follows:—

Thereafter the same day, in presence of me, the said notary-public, appeared the said C. D., who declared, that in order to prevent the return of the said bill, and the charges which might thereby be occasioned, he would and did accept the same for the honour of the said E. F. the drawer; and protested that his said acceptance should no otherwise be construed, and that he reserved all right of action and relief competent to him against the said E. F., in consequence of his acceptance of the said bill, as accords with law; in presence of the said witnesses.

R. H. *N. P.*

## PROTEST OF AN INLAND BILL OR NOTE.

At the day of one thousand eight hundred and

The original bill (or promissory-note) of which the above is an exact copy, was, at the place of payment, duly protested by

me, notary-public, subscribing, at the desire and instance of the holder A. B., merchant in Glasgow, against the above-designed accepter, (or against the granter, merchant in ), for non-payment of the contents, and against the drawer (or grantee) and indorsers, for recourse, interest, costs, and damages, as accords with law. Before these witnesses, C. D. & E. F.

## PROTEST FOR NON-DELIVERY OF A BILL.

On the day of one thousand eight hundred and

Before me, notary-public, appeared A. B., merchant in Edinburgh, who declared, that on the day of last, he left for acceptance, agreeably to usage and custom, with C. D., merchant there, a bill, dated the day of drawn by E. F. on the said C. D., for the sum of L.100 Sterling, and payable after date, and indorsed by the said E. F. to the said A. B.; and that he, the said A. B., had repeatedly sent to get back the same, accepted or unaccepted, (*if the bill have fallen due, say,* or to receive payment of the amount thereof,) but without success; wherefore he required me to demand delivery thereof, accepted or unaccepted, (*if it have fallen due, add,* or payment of the contents thereof,) and in default, to protest in conformity; whereupon I passed to the dwelling-house of the said C. D., and there, speaking to (*mention the person*), I demanded delivery of the said bill, accepted or unaccepted, (*if due,* or payment of the contents thereof); to which demand I received for answer, (*insert the answer.*) Wherefore I, the said notary-public, at the request foresaid, have protested, and hereby protest, as well against the said C. D. and the drawer of the said bill, as all others whom it may concern, for non-acceptance and non-delivery, (*if it have fallen due, add,* and for non-payment) of the said bill, and for exchange, re-exchange, interest, damages, and expenses, as accords. Thus done and protested in presence of, &c.

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